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SUPREME COURT, U.S.
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In The
Supreme Court of the United States

CHRISTOPHER JAMES NYGUEN AND SHARON K. NYGREN,
Petitioners,

v.

MINNEAPOLIS PUBLIC SCHOOLS; SPECIAL SCHOOL DISTRICT Nº 1; ET AL.
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix - Volume I of II

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Individuals with Disabilities Education Act, Which Requires Individually Tailored Services and an Individualized Assessment of Progress, Provides a Remedy to a Disabled Student Whose Individualized Education Program Focuses Exclusively on Social, Emotional and Behavioral Needs When He Makes Only Minimal Academic Progress According to Standardized Academic Achievement Tests.

2. Whether the Individuals with Disabilities Education Act, Which Requires a Free Appropriate Public Education to Disabled Students Incorporating State Educational Standards, Is Violated When State Educational Standards Requiring Positive Behavior Interventions and Limiting the Use of Aversive Procedures are Not Met.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 323 F.3d 630, and is reproduced at App. B. The order of the Eighth Circuit Court of Appeals denying rehearing is unreported, and is reproduced at App. A. The opinion of the District Court of Minnesota is reported at 36 IDELR 4, and is reproduced at App. C. The opinion of the state educational agency hearing review officer is unreported, and is reproduced at App. D. The original opinion of the state educational agency hearing officer is reported at 102 LRP 7834, and is reproduced at App. E.

JURISDICTION

The judgment to be reviewed was entered on March 21, 2003. A timely petition for rehearing and for rehearing en banc was denied on May 30, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

The relevant provisions of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.*, its implementing regulations, 34 C.F.R. Ch. 300, Section 504

Minnesota special education law, Minn. Stat. Ch. 121 and Ch. 125A, and its implementing regulations, Minn. R., Ch. 3525, are reproduced at App. F-Y.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the adequacy of special education and related services to students with emotional and behavioral disabilities under the Individuals with Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C. §§ 1401, *et seq.*, the meaning of this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982), and the validity of efforts by litigants to circumvent Congress's express commands in the IDEA regarding the individualized nature of special education services and requirements for positive behavior interventions in conformity with state educational standards.

CJN was eight years old and in the third grade during the events at issue during the 2000-2001 school year. CJN is an eligible special education student due to significant brain injury consisting of lesions in and atrophy of his brain, acquired in his pre-school years from a stroke, infection or demyelination. CJN's brain injury produces serious emotional, social, behavioral, and sensory disturbances and migraine headaches that render him in need of intensive behavioral support, individually tailored

need of intensive behavioral support, individually tailored services, and appropriate responses to his challenging behaviors if he is to learn emotional, social and behavioral skills that will enable him to perform adequately in school, and to be self-sufficient, independent and productive as an adult.

CJN was identified and served by the Minneapolis Public Schools ("District") as a special education student since kindergarten, and his mother also consistently provided him with private medical, mental health, and occupational therapy services since kindergarten. CJN's mother provided all relevant medical reports of his brain injury to the District before the start of his third grade year, and his special education eligibility is uncontested.

Consistent with the District's assessments of his eligibility and unique needs, CJN's Individualized Education Program ("IEP") for 2000-2001 identified as the basis of the special education interventions his needs for emotional, social and behavioral skill development, as did all his previous IEPs. App. D and E. CJN's eligibility for special education rested on his inability to build or maintain satisfactory interpersonal relationships with peers and adults, inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. CJN's eligibility for special education is

not based on academic needs. This determination was made in accordance with federal special education eligibility provisions for children with serious emotional disturbance, and with state special education eligibility provision for children with emotional or behavioral disorders. 34 C.F.R. § 300.7(c)(4); Minn. R. 3525.1329.

Consistent with his eligibility determination, CJN's IEP goals addressed only improving his abilities to maintain self-control, to comply with requests, to follow directions, to participate appropriately in class activities, to independently solve problems, to manage his anger, to build and maintain friendships, and to recognize his self worth. App. D and E. The District did not make any reports of CJN's progress in meeting the goals on his IEP. The only credible data in the record did show that CJN made no progress and in fact regressed in these skills identified for improvement on his IEP, demonstrated by increasing use of time-outs, exclusion from class, physical restraint and locked seclusion in response to the very behaviors identified for improvement in his IEP.

Contrary to the majority decision below, the record reflects that CJN was subjected to significant and increasing rates of punishment instead of interventions recognized as effective to address his challenging behaviors. His teacher maintained data showing that CJN was physically restrained every other day in the first half of his third grade year, at a rate six to eleven times greater

than the entire rest of his self-contained special education classroom peers combined for up to an hour at a time. App. D and E. Teacher data also showed that CJN was removed from class activities and sent to time-out every other day in the first half of his third grade year for an average of thirty minutes, three times longer than the average for the rest of his classroom peers. App. D and E. Without positive behavior interventions, contrary to experience and his private therapist's recommendations, and over the objection of his mother, locked seclusion was used with CJN for over an hour on three of his last days in the District schools, including one time for almost three hours. App. D and E. On the last day in the District schools CJN, signaling his frustration, wrapped his shirtsleeve around his neck in front of the observation room window of the locked seclusion room in a suicide attempt. He was suspended from school and removed from school by the police in handcuffs. App. D and E.

The hearing officer concluded:

> The Student's IEP team failed to undertake any analysis of the relationship between the Student's behavior and disciplinary exclusions. The Student was trapped in an increasingly punitive approach to disciplining, which resulted in increasing levels of isolation, time-out and locked seclusion for the Student. [Citations to the record omitted]. No meaningful review of the Student's IEP was undertaken. The failure of a

> district to formalize a plan for addressing the misconduct caused by a student's disability compounds the denial of FAPE. A behavior management plan is punitive in nature where it does not teach the student appropriate behaviors in a positive manner.

App. D.

The use of time-outs and restraints at school to address CJN's social, emotional and behavioral needs was never successful. App. D and E. CJN's treating mental health provider told his IEP team members that the use of restraint actually escalated his behavior. App. D and E. The use of time-outs and restraints at school were the most commonly used method to manage CJN's behavior. App. D and E.

In sharp contrast, when positive behavior interventions were used with CJN at school, his challenging behaviors were eliminated. App. D and E. The District refused to even consider using those methods in CJN's third grade. The hearing officer concluded:

> Past evaluation results and the success of past behavior management methods and strategies were ignored over the objection of the Parent.

App. D. Likewise, the dissent below recognized:

> The record in this case portrays a clear contrast. When the District adapted its approach to meet CJN's unique needs, he made some progress on his behavioral disabilities. But when the District expected CJN's behaviors to conform to its structured and inflexible approach, he began

> to self-destruct.

App. B, 323 F.3d at 643.

Three hearing-officer appointed independent educational evaluators testified that CJN had not been provided services individualized to meet his unique need for improved emotional, social, behavioral and sensory/motor skills. App. D and E. The majority below was satisfied that CJN's special education program provided him with meaningful progress on his IEP because it contained a standard point reward system and (in the last seven days) one-to-one paraprofessional support, because the District proposed two behavior intervention plans with which his mother disagreed, and because evidence from standardized academic achievement tests showed he made slight academic progress. App. B, 323 F.3d at 638-639, 642-643.

> Although it is true, as CJN contends, that the District 'offered only services available within its standardized program for students with emotional and behavioral disorders,' one can reasonably conclude from this
> record that more did not appear necessary at the time to help him make progress behaviorally.

App. B, 323 F.3d at 639.

The dissent below disagreed. Judge Kermit E. Bye correctly concluded that the success of CJN's IEP must be measured by progress in teaching him to control his

behavior, the very goals on his IEP, and that the District's punitive measures demonstrated the absence of individualized programming and the lack of adequate progress.

> The record is replete with evidence that the District's use of a time-out system to restrain and control CJN's behavior failed. The District's approach to CJN's unique disability was counterproductive and actually exacerbated his behavior problems. There is no evidence the time-out system and use of restraints taught CJN to control his behavior. Nor is there evidence the District's ultimate resort to police intervention would ever teach CJN how to become a productive member of society.

App. B, 323 F.3d at 647-648.

The majority below determined the District complied with the IDEA's requirement for positive behavior supports, as well as with Minnesota state education standards governing positive behavior interventions because CJN's IEP contained a standard point reward system and (in the last seven days) one-to-one paraprofessional support, because the District proposed two behavior intervention plans with which his mother disagreed, and because it grossly misread the uncontested evidence in the record of the significant frequency and intensity of the District's use of aversive and deprivation procedures. *Id.* At 640-641. The dissent disagreed:

> . . . I fear we allow Minnesota's education system to take a step backward with our tacit approval of the District's use of restraint to cope with CJN's behavioral outbursts.

App. B, 323 F.3d at 648.

The Eighth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. CJN and his mother seek issuance of a Writ of Certiorari to the Eighth Circuit Court of Appeals so that the decision can be reviewed and reversed.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's published ruling conflicts with the plain language of the IDEA, this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982), published decisions in the First, Third, Fourth, Sixth and Ninth Circuits, and other published decisions of the Eighth Circuit.

The Eighth Circuit's published opinion limits the meaning of "educational benefit" under the Act to academic benefit alone in a manner that undermines the individualized requirements for special education.

The issuance of a Writ in this matter is important to the utilization of the public schools by a large number and variety of disabled students. The vitality of state educational standards is at stake, as is the authority of the several states to set and enforce educational standards. The

decision below conflicts with the well-established and consistent construction given state educational standards by the administrative agency charged with its enforcement. The intent and meaning of the IDEA will be left in a state of confusion without this Court's clarification and restoration of the federal statutory principles eroded by the decision below. The issues presented are significant in administration of the IDEA by administrative hearing officers and lower courts. The decision below will cause a serious hindrance to the effective administration of the law.

I. The Eighth Circuit Has Decided An Important and Recurring Issue of Federal Special Education Law In A Manner That Conflicts Directly With This Court's Decision In *Rowley.*

CJN was provided a standardized program of special education and the appropriateness of that program was judged by a single standardized measure unrelated to his IEP. The conclusion of the majority below that this is all that is required under the IDEA is directly contrary to this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982). This Court recognized:

> The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP).

Rowley, supra at 181. This Court recognized the Act's

requirements for: 1) periodic review and revision of a child's IEP based on an assessment of progress towards achievement of the IEP goals (458 U.S. at 182); a delicate balance – deferring to the states on issues of educational methods and standards (without limitation), yet imposing significant requirements to be followed to discharge the responsibility for educating disabled children (458 U.S. at 183, 206-208); maintaining disabled children in the least restrictive environment (458 U.S. at 202-203); educating a wide spectrum of disabled children with varying abilities and needs, some academic and some non-academic (458 U.S. at 202); and the individualized nature of the assessment of sufficiency of educational benefits obtained (458 U.S. at 202).

> One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Rowley, supra at 202. This Court also recognized that testing, grading and advancement systems of the *regular classrooms* of public schools are "an important factor in determining educational benefit." *Id.* at 203. These factors do not apply to an analysis of the educational benefit CJN

received because he was educated in a self-contained special education classroom. Finally, this Court recognized that the appropriateness of special education must be measured by the success in "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* CJN's personalized instruction and support services are contained in his IEP goals and behavior intervention plan that focused exclusively on his attainment of social, emotional and behavioral goals. CJN's progress in achieving those goals is the only reasonable measure of the success or failure of his special education program.

The IDEA's requirements for individualized assessments of eligibility and needs, individually tailored programs of special education, periodic review and revision of achievement of goals on IEPs, positive behavioral support, manifestation determinations, limitations on disciplinary exclusions, least restrictive environment, and incorporation of state educational standards were essentially ignored by the court below, in direct contradiction to the explicit requirements of the Act and the decision in *Rowley*.

If all that is required to demonstrate an appropriate program of education to any disabled student is a showing of minimal progress on a standardized academic achievement test, then many of the IDEA's requirements are rendered meaningless. It will not matter that the IDEA

requires individualized assessment of each child's eligibility and needs. 20 U.S.C. § 1414(a), (b), and (c). It will not matter that the IDEA requires individually tailored programs of special education and related services to address assessed needs. 20 U.S.C. § 1414(d)(1)(A) and (d)(3)(A). It will not matter that the IDEA requires consideration of strategies and supports to address behavior that impedes the learning of the child or others, including positive behavioral interventions. 20 U.S.C. § 1414(d)(3)(B). It will not matter that the IDEA requires periodic review of a child's IEP to determine whether the goals are being achieved, and that the IEP be revised if progress towards goals is less than expected. 20 U.S.C. § 1414(d)(4). It will not matter that the IDEA requires the provision of a free appropriate public education to disabled children that both meets the standards of the State educational agency and is provided in conformity with an appropriately individualized education program. 20 U.S.C. §§ 1402(8)(B) and (D); 1412(a)(1). It will not matter that a state has exercised its authority to set state educational standards requiring the use of positive behavior interventions and limiting the overuse of aversive and deprivation procedures. Minn. Stat. § 121A.67, Minn. R. 3525.0850, and Minn. R. 3525.2900, Subp. 5. It will not matter that the IDEA limits the disciplinary exclusions of students with disabilities, and requires functional behavioral assessment and behavioral intervention plans to

address the behavior. 20 U.S.C. § 1415(k)(1). It will not matter that the IDEA requires school districts to analyze the relationship between a disabled child's disability and behavior leading to discipline, in order to customize an appropriate response. 20 U.S.C. § 1415(k)(4) and (5). It will not matter that the IDEA requires disabled children to be educated in the least restrictive environment, 20 U.S.C. § 1412(a)(5), a requirement only made meaningful if effective supports and services eliminate disciplinary removals from the classroom and school.

A. The Standard Established By This Court in *Rowley* Is Outdated And Was Significantly Altered by Intervening Acts of Congress.

This Court decided *Rowley* in 1982, at a time when it was operating under a misunderstanding of the interplay between the IDEA and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Section 504 requires equality of opportunity, participation and benefits for disabled children in all federally funded programs, including special education.

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794(a).

The *Rowley* majority specifically rejected the conclusion of the court of appeals that the IDEA and Section 504 must be read *in pari materia,* such that the appropriateness of a program of special education must be based, at least in part, on the equality of opportunity, benefits and services received by a disabled child in relation to his non-disabled peers. *Id.* at 189-190. The *Rowley* majority also limited its interpretation of the legislative intent in enacting the IDEA to congressional findings regarding opening the schoolhouse doors to disabled children, concluding that appropriate special education was little more than simple access to school. *Id.* at 191-192. This view of the intent of Congress in enactment had the effect of limiting the measure of the rights and protections contained in the Act. *Id.* There have been significant changes on both these fronts since the *Rowley* decision was issued that make its analysis and conclusions outdated and of questionable continuing validity.

The misunderstanding of the interplay between the IDEA (then the Education of the Handicapped Act) and Section 504 was illuminated further in this Court's decision in *Smith v. Robinson,* 468 U.S. 992, 1019-1020, 104 S.Ct. 3457, 3472 (1984) when it concluded that the IDEA and Section 504 were essentially duplicative. This was the same basis on which the *Rowley* Court rejected an equality of opportunity assessment of the adequacy of special

education under the Act. *Rowley, supra* at 189-190.

> Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent.

Fontenot v. Louisiana Board of Elementary and Secondary Education, 805 F.2d 1222 (5th Cir. 1986), cited with approval in *Cudjoe v. Independent School District No. 12*, 297 F.3d 1058 (10th Cir. 2002); *Wheeler v. Towanda Area School Dist.*, 950 F.2d 128 (3rd Cir. 1991); *Digre v. Roseville Schools Independent District No. 623*, 841 F.2d 245 (8th Cir. 1988); and *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805 (11th Cir. 1988).

Congress responded by enacting the Handicapped Children's Protection Act of 1986, P.L. 99-372, August 5, 1986, 100 Stat. 796, revising the Act to clearly provide that the rights and protections of the IDEA do not displace, and are not coextensive but are coterminous with, the rights and protections of Section 504. 20 U.S.C. § 1415(l), formerly § 1415(f) provides:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . .

Congress was clear that disabled children are entitled to equal opportunities to participate in and benefit from public

education in addition to the rights and protections afforded them under the Act.

The IDEA as reauthorized by Congress in 1997 updated the findings on which the revised Act was improved. Congressional findings in the IDEA 1997 focused, among other things: on improving educational results for disabled children (20 U.S.C. § 1401(c)(1) and (3)), on increasing expectations for students with disabilities and on applying proven methods of teaching and learning for children with disabilities (20 U.S.C. § 1401(c)(4)), and on making the education of children with disabilities more effective through high expectations, access to general curriculum, parental participation, services and supports in the regular classroom, and professional development for special educators to ensure that children with disabilities have skills and knowledge:

> (i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and
>
> (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible.

20 U.S.C. § 1401(c)(5). Congress was clear that simply providing access and minimal academic benefit is no longer sufficient under the Act.

The words of this Court in *Brown v. Bd. Of*

Education of Topeka, 347 U.S. 483, 74 S.Ct. 686 (1954) apply today to disabled children of this nation.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, supra at 493.

B. Minnesota Has Set Educational Standards For Behavior Interventions.

The Act, at 20 U.S.C. § 1402(8), requires that special education services meet the State's educational standards, as recognized by this Court in *Rowley,* 458 U.S. at 187-189, 203. This is one of the conditions that must be met in order for a school district to provide a disabled

student a free appropriate public education. *Id.* at 188-189. If state standards are not met, then a free appropriate public education is not being provided, as was the case with CJN. Minnesota has longstanding educational standards governing behavioral interventions for special education students. Minnesota law governs the use of aversive and deprivation procedures, and directs that special education rules in Minnesota must "promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures." Minn. Stat. § 121A.67. State educational policy and standards in Minnesota provide:

> This policy is intended to encourage the use of positive approaches to behavioral interventions. The objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination. Behavioral intervention policies, programs, or procedures must be designed to enable a pupil to benefit from an appropriate, individualized educational program as well as develop skills to enable them to function as independently as possible in their communities.

Minn. R. 3525.0850. Minnesota standards require that behavior interventions to disabled students both permit benefit from an appropriate IEP, as well as promote

development of independent functioning skills. For CJN, neither of these outcomes is measured by minimal academic progress on a standardized achievement test.

Minnesota educational standards also limit the use of aversive and deprivation procedures in that they cannot be utilized unless: 1) they are written in the child's IEP or are used in an emergency; 2) a functional behavioral assessment identifies the frequency and severity of target behaviors; 3) at least two positive interventions are implemented and their effectiveness identified; and 4) they are designed and implemented based on a child's assessed needs, consistent with his goals and documented in his IEP. Minn. R. 3525.2900, Subp. 5. In addition, Minnesota parents may withhold or withdraw consent to the use of these procedures, and they must be stopped immediately. Minn. R. 3525.2900, Subp. 5(E). In 2001, the Minnesota legislature amended the child abuse statute to include within its definition of "physical abuse" the unauthorized use of aversive and deprivation procedures in schools. Minn. Stat. § 626.556, subd. 2(d).

The Minnesota Department of Education (formerly the Minnesota Department of Children, Families & Learning)("MDE") is the state agency charged with supervising special education services in all school districts in Minnesota, and with investigating, deciding and correcting violations of special education students' rights. 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.660-.662. MDE

has repeatedly and consistently interpreted and enforced Minnesota state educational standards regarding behavior interventions with disabled students in a manner virtually ignored by the majority opinion below. Four examples of relevant state complaint decisions are reproduced in the Appendix at V-Y, demonstrating the widespread problems with overuse and abuse of conditional procedures in Minnesota despite high state educational standards.

> The use of time-out for seclusion, manual and mechanical restraints, and other interventions are extraordinary measures to be used as little as possible and for short durations. The frequent and prolonged use of the intervention area, including [seclusion], with the Student should have prompted the District to conduct an evaluation early in his placement . . .

Complaint Decision No. 1408 (SEA MN March 29, 2002). App., Y.

> Seclusion for brief periods may be defensible, but not confinement for one to six hours forcing a student into discomfort, making this a punitive, negative intervention.

Id., citing Minn. R. 3525.2900, subp. 5(D)(6) and 3525.0850. MDE recognized that where the public schools use conditional procedures without adherence to Minnesota educational standards governing their use, a disabled student is unnecessarily removed from his classroom, deprived of educational opportunities, impairing his ability

to receive a free appropriate public education, and entitling him to remedial relief. App. Y.

MDE next determined that the school violated state standards by the frequent use of restraints and isolation "without due consideration of alternatives. In addition, isolated seclusion for hours at a time is grievous." *Complaint Decision No. 1730*, (SEA MN Sept. 19, 2002). App. X. The MDE determined again that when behavior interventions fail to meet state standards students suffer educational harm due in part to loss of instructional time during disciplinary removals from the classroom. App. X.

MDE determined again that the school violated state standards by the frequent use of breakout rooms without complying with Minnesota educational standards. *Complaint Decision No. 1760* (SEA MN December 19, 2002). App. W. MDE was troubled by the pervasive and frequent use of time-outs, noting that "seclusion of a Student in public schools is highly regulated because of its potential detrimental effect on the Student." App. W, citing to CFL Policy Letter, May 15, 2002. MDE determined that conditional procedures not done on an individualized basis according to the individual needs of students do not justify this type of "extraordinary form of intervention" and cannot be used except in emergency situations. App. W. MDE concluded that when conditional procedures resulted in removals from class, students were also deprived of educational services. App. W.

> The use of breakout rooms for hours at a time and for large cumulative totals is grievous. Moreover, if Students have been removed from instructional opportunities for discipline whether in the form of suspensions, in-school suspensions or breakout rooms, for over ten cumulative days, there may be a change in placement.

Id., App. W.

Again, MDE concluded that the use of aversive and deprivation procedures without following the proper conditions for use in Minnesota educational standards violates a student's right to a free appropriate public education under the Act, entitling him to remedial relief. *Complaint Decision No. 1809* (SEA MN February 18, 2003). App. V.

> Whether a specially designed room is locked is not the determinative factor in determining whether a procedure constitutes time-out for seclusion. The key consideration is whether the Student was isolated from others.

Id., App. V. MDE concluded that without criteria for returning the student to the classroom, without limits on the time that students may be secluded, without an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons prior to its use, without parental consent, and without inclusion in the student's IEP, seclusion time-outs violated state

educational standards. *Id.*, App. V.

Analyzed under the appropriate state educational standards as demonstrated through these MDE complaint decisions, the District's use of aversive and deprivation procedures without compliance with the conditions for use constituted repeated and serious violations of CJN's rights and resulted in denial of a free appropriate public education.

II. The Eighth Circuit Has Decided The Standard for Federal Special Education Benefit In a Manner That Conflicts Directly Or In Principle With Rulings Of the First, Third, Fourth, Sixth and Ninth Circuits.

The majority decision below determined that a standardized program of special education to address CJN's emotional and behavioral disability was sufficient to provide a free appropriate public education to him under the IDEA, as measured by his academic progress on a standardized academic achievement test. App. B. The majority decision also concluded that punitive and counter-productive behavior interventions that violate state educational standards provided a free appropriate public education to CJN under the Act. App. B. These decisions conflicts directly or in principle with multiple rulings of other circuit courts.

The First Circuit Court of Appeals determined that behavioral skills as well as academic skills must be taught

if a child's assessment indicates his need for such instruction, in order to receive a free appropriate public education under the IDEA. *David D. v. Dartmouth School Committee,* 775 F.2d 411, 423 (1st Cir. 1985). The Court recognized that the child's lack of self-control and related behavior problems were educational problems that must be addressed in order for his participation at school and in his community. *Id.*, 775 F.2d at 423. The Court also decided that the IDEA requires adherence to state educational standards in evaluating the appropriateness of special education services. *Id.*, 775 F.2d at 417-419.

The Third Circuit Court of Appeals decided that a child's assessed needs for non-academic services (physical therapy) were individualized educational services to be provided under the Act, and that trivial or de minimis education benefits do not satisfy the Act's guarantee of a free appropriate public education. *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171 (3rd Cir. 1988). The Court recognized that many related services provided pursuant to the Act "serve as important facilitators of classroom learning." *Id.* at 176. "Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point." *Id.* The Court recognized that instruction in these fundamental skills "may form the core of a severely disabled child's special education program." *Id.*

> Christopher's progress cannot be measured by advancement in grade or acquisition of academic skill. His needs are drastically different, but no less important.

Id. See also, Kruelle v. New Castle County School District, 642 F.2d 687, 693 (3rd Cir. 1981)(special education for a low-functioning child stresses basic life skills); *Board of Education v. Diamond,* 808 F.2d 987, 992 (3rd Cir. 1986)(some benefit connotes an amount of benefit greater than mere trivial advancement); *M.C. v. Central Regional School District,* 81 F.3d 389 (3rd Cir. 1996)(IDEA requires more than a *de minimis* benefit, and educational progress is measured according to child's identified needs to address behaviors and functional skills); and *Ridgewood Board of Education v. N.E.,* 172 F.3d 238 (3rd Cir. 1999)(a free appropriate education is more than a trivial benefit, but must provide significant learning and confer meaningful benefit, and when student display considerable intellectual potential, IDEA requires a great deal more than a negligible benefit).

In *Clevenger v. Oak Ridge*, 744 F.2nd 514 (6th Cir. 1984), the court found that because "Richard's main learning problem" was "his inability to cooperate with authority," the district was obligated to provide a program that "specifically takes into account and provides for this lack of cooperation." The Sixth Circuit rejected the district's argument that its obligation is mitigated by an

expectation that the student demonstrate motivation and cooperation and specifically ordered the district to provide programming that met the student's unique educational needs. *Id.* at 516. See also, *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982).

The Fourth Circuit decided, in *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), that the *Rowley* analysis was limited to that one case when it adopted promotion and grades as a means of determining the student's progress. *Id.* at 635-636. The *Hall* Court agreed that special education must be tailored to the individual child's capabilities. *Id.* at 636.

More recently, the Ninth Circuit in *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996) put a much finer point on the issue when it found that testing appropriately on standardized tests is not the *sine qua non* of educational benefit and that unique educational needs "shall be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." *Id.* at 1500.

III. The Eighth Circuit's Decision Is In Conflict With Its Other Rulings.

The Honorable Kermit E. Bye, in his dissent, articulates the conflict created by the majority decision with previous decisions of the Eighth Circuit Court. App. B. In *Ind. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776-777 (8th

Cir. 2001) the court established that behavior problems must be effectively addressed for students whose special education needs are based on disabilities that impair their behavioral skills. The court in *A.C.* held the school district responsible to teach the student emotional, behavioral and social skills as part of its duty to provide special education on the basis of her social, emotional and behavioral disability, even when that duty required an extraordinary, residential, full-time, individualized treatment program. *A.C., supra* at 779.

The court in *Neosho R-V School Dist. v. Clark,* 315 F.3d 1022, 1028 (8th Cir. 2003) decided that the lack of an effective behavior intervention plan deprives a disabled student of his right to a free appropriate public education, and unsupported claims of academic progress for a child whose IEP identifies a need for behavioral *and* academic instruction does not alter that conclusion. CJN did not have an effective behavior intervention plan as demonstrated by the undisputed evidence on the record of his regression on the behavioral goals on his IEP that identified a need for *only* behavioral instruction. The *Clark* Court analyzed the adequacy of Robert's IEP based on the ability of his teachers to "successfully reduce the inappropriate behavior in a manner fitting to Robert's disabilities." *Id.* at 1029. The court in *Clark* recognized that specific evidence of *de minimis* academic and social progress can be discounted in light of contradictory evidence in a record, and evidence of

progress on skills addressed by the main goal of a student's IEP is the proper focus of analysis of educational benefit under the Act. *Id.* at 1029.

The court in *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1034 (8th Cir. 2000) correctly recognized that the IDEA requires a specialized course of instruction to be developed for each disabled student, taking into account the child's capabilities. A standard program is not a specialized course of instruction taking into account his particular disabilities, and no evidence in the record supports C.J.N.'s progress with behaviors. The *Gill* Court correctly analyzed the educational benefit of Matthew's IEP in the context of his disability and based on the content of his IEP addressing his cognitive, verbal and social skills deficits. *Id.* at 1038. The majority here analyzed the educational benefit of CJN's IEP on the basis of standardized academic testing when his IEP recognized his strength in standardized academic testing.

The court in *Ft. Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612-613 (8th Cir. 1997) recognized that the nature of the student's disability and the progress he makes on the goals identified in his IEP must be considered in determining the benefit of a special education program. The majority decision did not address the lack of progress CJN made on the goals identified in his IEP. By focusing on the benefit derived by CJN in his area of non-disability, the majority undercuts the very purpose of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,
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(2) Supreme Court, U.S. FILED

03-345 AUG 27 2003

OFFICE OF THE CLERK

In The Supreme Court of the United States

CHRISTOPHER JAMES NYGUEN AND SHARON K. NYGREN,
Petitioners,

v.

MINNEAPOLIS PUBLIC SCHOOLS; SPECIAL SCHOOL DISTRICT Nº 1; ET AL.
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix - Volume II of II

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August, 2003

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Nº 02-1261

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CJN, etc.,	)	
Appellant,	)	
	)	**Order Denying Petition**
vs.	)	**for Rehearing and for**
	)	**Rehearing En Banc**
MINNEAPOLIS PUBLIC	)	
SCHOOLS, etc., et al.,	)	
Appellees.	)	

FILED
May 30, 20032

Clerk,
U.S. Court of
Appeals
Eighth Circuit

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillan, Judge Bye, Judge Melloy, and Judge Smith would grant the petition for rehearing en banc.
(5128-010199)

May 30, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

FILED
Mar. 21, 2001
Clerk
U.S. Court of
Appeals
Eighth Circuit

Nº 02-1261

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CJN,
by and through his Parent and
Natural Guardian SKN,
Appellant,
v.
Minneapolis Public Schools,
Special No. 1; Minneapolis
Board of Education; Catherine
Shreves, Chair; Carol Johnson,
Superintendent, in their
representative capacities,
Appellees.

Children's Law Center ;
ARC Minnesota;
ARC Hennepin-Carver,
Amici on Behalf of Appellant.

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *CJN v. Minneapolis Pub. Schs, 2003 U.S. App. LEXIS 10804 (8th Cir., May 30, 2003)*

PRIOR HISTORY: Appeal from the United States District Court for the District of Minnesota. School District of Minnesota.

DISPOSITION: Affirmed.

COUNSEL: For CHRISTOPHER JAMES NYGREN, Plaintiff - Appellant: Margaret O'Sullivan Kane, St. Paul, MN. Amy Jane Goetz, CENTER FOR EDUATION LAW, St. Paul, MN.

For Minneapolis Public Schools, Minneapolis Board of Education, CATHERINE SHREVES, CAROL JOHNSON, Defendants - Appellees: Eric John Magnuson, Karen A. Janisch, Laura Tubbs Booth, RIDER & BENNETT, Minneapolis, MN.

For CHILDREN'S LAW CENTER OF MINNESOTA, Amicus on Behalf of: David E. Oslund, ROBINS & KAPLAN, Minneapolis, MN. John P. Morgan, ROBINS &

KAPLAN, Minneapolis, MN. Gail Chang Bohr, CHILDREN'S LAW CENTER, St. Paul, MN.

For ARC MINNESOTA, Amicus on Behalf of: Luther A. Granquist, MINNESOTA DISABILITY LAW CENTER, Minneapolis, MN.

For ARC HENNEPIN-CARVER, Amicus on Behalf of: Luther A. Granquist, MINNESOTA DISABILITY LAW CENTER, Minneapolis, MN.

JUDGES: Before MORRIS SHEPPARD ARNOLD, MAGILL, and BYE, Circuit Judges. BYE, Circuit Judge, dissenting

OPINIONBY: MORRIS SHEPPARD ARNOLD

OPINION: MORRIS SHEPPARD ARNOLD, Circuit Judge.

This case raises the question, among others, of whether a disabled student, whom we shall call CJN, received a free, appropriate public education (FAPE) in his third-grade year as required by the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § § 1400 - 1487.*

The district court[1] held that he did, focusing on CJN's academic progress and the continuous efforts to tailor his individualized education plan (IEP) to his behavioral challenges. Because we agree with the district court that CJN received a FAPE, and agree as well with its assessment of related issues, we affirm.

I.

As part of providing a FAPE under the IDEA, a school must formulate an IEP tailored to the disabled child's unique needs. *20 U.S.C. § 1412.* For an IEP to pass substantive muster, it must be "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982).*

CJN is an eleven-year-old boy with lesions in his brain and a long history of psychiatric illness. A special education student in the Minneapolis Public Schools, Special School District No. 1 (District) since kindergarten. CJN has consistently had behavioral difficulties while nonetheless progressing academically at an average rate.

At the beginning of his third-grade year in September, 2000, CJN was placed in a special program for elementary

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

needs (SPEN) classroom at Keewaydin Elementary School (moving with a teacher from his prior school) while he awaited the results of a functional behavior assessment and an occupational therapy evaluation. Within a few weeks, he had transferred to Elana Schroeder's SPEN classroom, because it provided more structure and because her students functioned at a higher academic level. In light of CJN's educational needs, Ms. Schroeder offered him reduced homework assignments, more time to complete assignments, positive reinforcement for meeting minimal requirements, and a so-called token economy system for reinforcing good behavior.

CJN nevertheless misbehaved in Ms. Schroeder's classroom many times, leading to him being given "time-outs" and even to being physically restrained. Most episodes of restraint were for less than a minute, but there were six days on which CJN was restrained for five or more minutes: Restraint was used after CJN began kicking others, hitting staff with pencils, or banging his head against the wall. On one occasion in December, a behavioral outburst led to police intervention and a period of hospitalization for CJN. This was his last day at Keeywaydin.

CJN's IEP team convened in October, 2000, to discuss his evaluation results and recent misbehavior and again in

November to discuss his behavioral goals and the procedures to be followed if CJN required restraint. Immediately after the holiday break, CJN's IEP team decided that he would divide his time between Whittier Elementary School and a day treatment program. At Whittier, CJN was to receive the help of a one-to-one paraprofessional and was to participate in a point reward system to reinforce good behavior. CJN attended Whittier for only seven half-days, however, because an episode occurred that required him to be taken to a local crisis center. The District and his mother then agreed to instruction at home, but, a day after that instruction began, his mother unilaterally decided to enroll CJN in Calvin Academy, a private school that serves disabled and "at-risk" students.

CJN's mother then filed a complaint with the Minnesota Department of Children, Families and Learning, seeking, among other things, a declaration that the District had not provided CJN with a FAPE and asking for reimbursement for his private school tuition. As part of this proceeding, several independent evaluators analyzed CJN, the principal evaluation being provided by Dr. Richard Ziegler. In March, the IEP team reviewed Dr. Ziegler's summary and proposed that CJN be placed in a "Public Separate Day School setting" which could provide more mental health

services than Whittier. CJN has continued to have significant behavioral difficulties at Calvin Academy.

Based on 290 "findings of fact," an independent hearing officer (HO) found that although CJN had received a FAPE through the second grade, he had not received one from September 2000 to February 2001, mainly because of the lack of sufficient positive behavioral interventions during the latter period and the amount of physical restraint that he was subjected to. In addition to granting other relief, the HO ordered the District to reimburse CJN's mother for his private school tuition and placed him at Calvin through the 2002-2003 academic school year. On appeal, a state hearing review officer (HRO) reversed the HO's decision that CJN did not receive a FAPE from September 2000 to February 2001, adopting 286 of the HO's "findings of fact" and making thirty-five more of his own. The district court affirmed the HRO's decision, giving due weight to the HRO's conclusions and focusing on CJN's academic progress and his IEP team's continuous efforts to refine his IEPs to account for his behavioral challenges in its eight IEP team meetings between August 29, 2000, and March 2, 2001.

II.

CJN first argues that the district court erred by not deferring to the HO's conclusions of law and credibility

determinations. In particular, CJN contends that the HRO wrongly reversed the HO's credibility determinations when adopting the thirty-five additional "findings of fact" and making its "conclusions of law," upon which the district court relied.an atmosphere that is conducive to learning; and meet the child's special physical, sensory, and emotional needs

Under the IDEA, a district court must review the state administrative record, hear additional evidence if requested, and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *20 U.S.C. § 1415(i)(2)(B).* Although a district court should independently determine whether the child has received a FAPE, it must give "due weight" to agency decisionmaking . *Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996).* "The district court must give 'due weight' because the administrative panel had an opportunity to observe the demeanor of the witnesses and because the court should not substitute its own educational policy for those of the school authorities that they review." *Strawn v. Missouri State Bd. of Educ., 210 F.3d 954, 958 (8th Cir. 2000).* When, as here, the relevant state has a two-tier administrative review system, we have recognized that "where there is a conflict between the findings and conclusions of the hearing panel

and the final reviewing officer, a court may choose to credit the hearing panel's findings based on observation of the witnesses." *Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997), cert. denied, 523 U.S. 1137, 140 L. Ed. 2d 1090, 118 S. Ct. 1840 (1998).*

CJN contends that the HO properly discredited the views of the school authorities and, thus, the HRO erred by believing them and adopting "unsupported credibility-based findings of fact and conclusions." We reject this characterization of what the HRO did, however, since neither his additional findings nor his conclusions were based on credibility determinations different from those of the HO, much less on a different view of the underlying facts.

We admit that some confusion arises because both the HO and the HRO use the terms "findings of fact" and "conclusions of law" in an unconventional fashion. For instance, the vast majority of both the HO's and HRO's "findings of fact" are not facts that the HO or HRO actually found, but rather statements of what different witnesses testified to during the twelve days of hearings before the HO. We believe that what the HO and the HRO actually found as facts are located in their "conclusions of law," intermixed with their actual legal conclusions.

Perhaps, given the 3000-page HO hearing transcript, it would be reasonable to believe that both the HO and HRO were endorsing as findings the testimony that they recited. But even if we were to draw that inference, nothing in the record indicates that the HO and HRO believed different witnesses to be credible or believed that different events occurred. In most instances, the HRO's "findings of fact" simply rehearsed matters that were already acknowledged in the HO's "findings of fact."

The HRO's "conclusions of law" also do not indicate that the HRO had a view of any witness's credibility that differed from the HO's, as revealed by a close analysis of the "conclusions of law" on which the HRO and the HO differed. Although two of the HRO's conclusions speak of the "credible evidence," neither rested on the existence of any fact that the HO did not acknowledge as well. Indeed, in our best estimation, we interpret the phrase "credible evidence" in these two conclusions to mean "evidence that suffices under the law." Consequently, we interpret the HRO's statements such as "there is no credible evidence that these reviews ... failed to adequately assess the appropriateness of the IEP" to mean only that he differed from the HO with respect to the relevant legal conclusion, *i.e.*, as to what constitutes an adequate assessment of the

appropriateness of the IEP, and not with respect to the underlying facts.

CJN has not challenged any specific legal conclusion of the HRO as erroneous other than the HRO's ultimate determination that CJN had received a FAPE. He argues generally that the HO's conclusions of law "are so imbued with credibility determinations and educational expertise that they are owed significant deference," but this argument fails to recognize that the issue of whether a FAPE has been provided is a mixed question of law and fact, *Strawn, 210 F.3d at 958*, and misapprehends the role of reviewing officers in two-tier administrative review systems. With such mixed questions, the HRO is obligated to determine independently the legal si gnificance of the facts. That the HRO ultimately sided with the District means neither that he necessarily believed the school authorities' testimony more than the HO did nor that his analysis was incorrect. It means only that the HRO reached a different conclusion based on his understanding of the law. The district court did not err in giving "due weight" to the HRO's conclusion.

III.

CJN also challenges the district court's decision not to reimburse CJN for his private school tuition. The IDEA provides that "if the parents of a child with a disability, who previously received special education ..., enroll the

child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment." *20 U.S.C. § 1412(a)(10)(C)(ii).* The district court denied reimbursement pursuant to its decision that CJN had received a FAPE prior to his enrollment. We review the district court's determination that CJN received a FAPE *de novo. Strawn, 210 F.3d at 958.* But in "the absence of a mistake of law, we review the district court's factual determinations for clear error." *Id.*

CJN maintains that the district court erred in holding that the District provided him with a FAPE in his third-grade year based on academic progress alone. CJN contends that evidence of academic progress is particularly irrelevant here "because his disability does not adversely affect his ability to learn" academically. CJN points to the amount of physical restraint to which he was subject and the high number of "time-outs" imposed on him, arguing that they are fundamentally inconsistent with the existence of a FAPE. CJN maintains that Minnesota law requires more positive behavioral reinforcement and more analysis

of CJN's behavioral problems than CJN received before he can be said to have received a FAPE.

The District responds by stating that CJN's IEPs need to be analyzed at the time of their adoption. It asserts that his IEP team consistently focused on CJN's behavioral problems using the information that they had available, including a functional behavior assessment and an occupational therapy evaluation. It contends that CJN received positive behavioral interventions in the form of the token economy system and point rewards system as well as sufficient personalized services, such as the attention of a one-to-one paraprofessional. And it points to the fact that CJN was progressing at an average rate academically.

At the outset, we reject CJN's characterization of the district court's holding as based on academic progress alone. Although the district court does state that "CJN was learning within the average range in his academic subjects, thus demonstrating educational progress," this statement came only after the court's observations that "with CJN's behavioral challenges in mind, the team tailored the IEP to his needs" and that "at numerous meetings, CJN's IEP team was continually making efforts to refine his instruction programs." We view the district court's acknowledgment of CJN's academic progress to mean only that his IEP was

managing CJN's behavioral problems in a way that allowed him to learn. *Cf. Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 777 (8th Cir. 2001).* Academic progress, the Supreme Court has stated, is an "important factor" in ascertaining whether a disabled student's IEP was reasonably calculated to provide educational benefit. *Rowley, 458 U.S. at 202.*

We also reject CJN's contention that because academic progress "has not been identified as among C.J.N.'s educational needs," evidence of academic progress is particularly irrelevant in CJN's case. As we recently noted in *A.C., 258 F.3d at 776-77*, "at least in Congress's judgment, social and emotional problems are not *ipso facto* separable from the learning process." Behavioral difficulties might impede learning ability even if the individual is not learning disabled. *Id.* The record squarely supports the conclusion that that is the situation here. For instance, Dr. Ziegler's report explains how frontal lobe activity is responsible for an individual's ability to plan and affects his or her "flexibility, generation of information, inhibition of impulses, and working memory." In relation to CJN, Dr. Ziegler states that "while some skills associated with frontal lobe functioning are intact, it is clear that his behavioral and emotional dysregulation and disinhibition associated with his frontal striatal lesion can overwhelm these adequately developed skills to [the] point where he is

unable to utilize them in his school environment." Unlike the situation in *A.C., 258 F.3d at 777*, where the student was falling behind despite the lack of a learning disability, CJN has always progressed academically at an average rate. That his behavioral difficulties are severe, as CJN contends, makes his academic progress even more relevant to the educational benefit inquiry, because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well.

When a disabled student has failed to achieve some major goals, it is difficult to look back at the many roads not taken and ascertain exactly how reasonable his IEPs were at the time of their adoption. *Cf. Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990), cert. denied, 499 U.S. 912, 113 L. Ed. 2d 230, 111 S. Ct. 1122 (1991).* But this difficulty is precisely why we have recognized that "as long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology." *Fort Zumwalt, 119 F.3d at 614.* Specific results are not required, *34 C.F.R. § 300.350(b)*, and an IEP need not be designed to maximize a student's potential "commensurate with the opportunity provided to other children," *see Rowley, 458 U.S. at 189-198.* Thus, even assuming *arguendo* that more positive

behavior interventions could have been employed, that fact is largely irrelevant. The record reveals that the District made a "good faith effort" to assist CJN in achieving his educational goals. *See 34 C.F.R. § 300.350(a)(2).* Although it is true, as CJN contends, that the District "offered only services available within its standardized programs for students with emotional and behavioral disorders," one can reasonably conclude from this record that more did not appear necessary at the time to help him progress behaviorally. Indeed, at the January IEP meeting, undisputed testimony indicates that the District suggested a more structured setting as an alternative to Whittier, but CJN's mother chose Whittier instead.

We of course very much regret that CJN was subject to an increased amount of restraint in his third-grade year, but that fact alone does not make his education inappropriate within the meaning of the IDEA. In response to his difficulties, the District made its suspension policy more lenient, suspending him only in the case of physical aggression to adults, children, or property. We believe that this demonstrates a good faith effort and comports, moreover, with a previous observation of ours that schools' suspension policies toward disabled students must be "appropriate in the context of the IEP." *See A.C., 258 F.3d at 776.* Because the appropriate use of restraint may help

prevent bad behavior from escalating to a level where a suspension is required, we refuse to create a rule prohibiting its use, even if its frequency is increasing.

CJN contends that restraints and "time-outs" were used inappropriately here, pointing to four purported violations of Minnesota rules governing behavioral interventions. In analyzing these purported deficiencies, we note that minor "procedural and technical deficiencies in the IEPs" cannot support a claim that a FAPE has been denied. *See S.D., 88 F.3d at 562*; *cf. Evans v. Dist. No. 17 of Douglas County, Nebraska, 841 F.2d 824, 830-31 (8th Cir. 1988).*

As CJN correctly notes, under the IDEA a disabled student's IEP must "meet the standards of the State educational agency." *20 U.S.C. § 1401(8)(B).* Thus, "when a state provides for educational benefits exceeding the minimum federal standards set forth under *Rowley*, the state standards are ... enforceable through the IDEA." *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 658 (8th Cir. 1999).*

First, CJN contends that his IEP was inappropriate because CJN was constantly being restrained in emergency situations and his team failed to develop a behavioral intervention program (BIP) that focused on skill acquisition. CJN argues that such a BIP was required

because Minnesota has chosen to exceed the federal requirements.

Under the IDEA, IEP teams are required to consider positive behavioral interventions where appropriate. *20 U.S.C. § 1414(d)(3)(B)(i)*. Under Minnesota law, "the objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that [BIPs] focus on skills acquisition rather than merely behavior reduction or elimination." Minn. R. 3525.0850. Neither the district court nor the HRO explicitly addressed this Minnesota requirement, although the HRO's decision arguably did so implicitly when it pointed to the existence of positive reinforcement mechanisms such as the token economy system in CJN's IEP.

At the October IEP meeting, Ms. Schroeder had proposed a BIP that included both positive reinforcement mechanisms as well as what is called conditional procedures (*e.g.*, time-outs and physical restraint). No BIP was adopted, however, because of CJN's mother's disagreement with the proposal. They discussed the matter again in November, at which time CJN's mother dismissed the team's suggestions as counterproductive. In January, CJN's teacher at Whittier was in the process of developing a plan, but CJN was withdrawn from her classroom before she finished it. Heeding *Rowley's* warning that "courts must

be careful to avoid imposing their view of preferable educational methods upon the States," *458 U.S. at 207*, and giving "due weight" to the HRO's implicit decision of sufficiency, we do not believe that the failure to develop a BIP could fairly be said to constitute a denial of a FAPE in these circumstances.

CJN also contends that the number of IEP team meetings was insufficient in view of a Minnesota rule providing that when conditional procedures are used in an emergency situation "twice in a month or [when] a pupil's pattern of behavior is emerging ... a team meeting must be called to determine if the pupil's IEP is adequate ... no later than five school days after emergency procedures have commenced." Minn. R. 3525.2900, subp. 5C. The district court did not discuss this rule.

This rule was violated if one views the five-day requirement as restarting with every two emergency interventions. Conditional procedures were used on October 10, 11, and 12, but the only IEP meetings were on October 10 and November 14. We need not, however, resolve the nuances of the rule's interpretation, because the record reveals that any potential violation was immaterial. As we have already noted, CJN's IEP team consistently addressed the use of conditional procedures in their IEP meetings, but a BIP was not adopted because of his

mother's disagreement. We believe that the purpose of the relevant rule is to guarantee that the IEP team is aware that conditional procedures have been employed and to allow the IEP team to develop a BIP, because under Minnesota law conditional procedures can be used either in an emergency situation *or* pursuant to a BIP (as part of an IEP), *see id.* subp. 5A(1). That requisite awareness and the attempt to develop a BIP already existed here. Failure to hold more meetings is immaterial.

CJN points, in addition, to a state requirement that IEP teams identify "the frequency and severity of target behaviors for which the conditional procedure is being considered" before using conditional procedures. *Id.* This provision, however, does not apply here, as it pertains only to conditional procedures resorted to as part of a BIP and not to emergency situations like the ones in the instant case.

CJN argues finally that "time-outs" of more than an hour violate state standards *per se*, citing a state administrative decision that holds that"seclusion for brief periods may be defensible, but not confinement for one to six hours forcing a student into discomfort, making [the action at issue] a punitive, negative intervention" under Minn. R. 3525.0850. *Complaint File # 1408*, p.16 (State Educ. Agency Minn. March 29, 2002). But close analysis

of the Minnesota Department of Children, Families and Learning's statement in this file reveals that its conclusion was based both on the duration of the "time-out" and the fact that the "time-out" room had no place for the child to sit, which is not the situation here. Furthermore, the only timeouts of more than an hour occurred in the seven half-days at Whittier. Any violation of the State's rule would therefore be immaterial to a larger determination of whether reimbursement was required. *Cf. S.D., 88 F.3d at 562.*

We believe, moreover, that all the other purported deficiencies to which CJN directs our attention, such as the absence of a specifically identified "Public Separate Day School" in the March IEP (the IEP listed only the relevant setting level and not a precise location) are equally immaterial to our discussion given the February decision to enroll CJN in private school. Accordingly, the district court did not err in determining that the District provided CJN with a FAPE in his third-grade year and in denying CJN's mother's request for tuition reimbursement.

IV.

CJN next maintains that the district court erred by not ordering his prospective placement at Calvin, since that school offers more interaction with children who are not

disabled than Crawford Academy, the currently proposed "Public Separate Day School." We disagree.

While it is true that the IDEA expresses a strong preference in favor of disabled children attending regular classes with children who are not disabled, *see 20 U.S.C. § 1412 (5) (1994)*, the Supreme Court has held that this creates a presumption in favor of public school placement, *see School Comm. of Burlington v. Department of Educ. of Mass., 471 U.S. 359, 373, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985)*. We have stated that the IDEA's objective is satisfied when there are disabled students and students who are not disabled at the same school. *Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52, 54 (8th Cir. 1986), cert. denied, 480 U.S. 936, 94 L. Ed. 2d 769, 107 S. Ct. 1579 (1987)*. Because there are students who are not disabled at Crawford, the district court did not err in failing to order Calvin as CJN's prospective placement.

V.

CJN argues finally that the district court erred in determining that CJN was not entitled to remain at Calvin pending a final determination on the merits of this appeal, given the HO's decision that Calvin was the appropriate prospective placement. Under the IDEA's so-called "stay-put" provision, "during the pendency of any proceedings [under *§ 1415*], unless the State or local educational

agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child ... until all such proceedings have been completed." *20 U.S.C. § 1415(j)*. CJN's mother and the District reached an interim agreement that the District would pay for CJN to attend Calvin until February 4, 2002, but they also agreed that this agreement would not affect CJN's "stay-put" placement. The district court held that CJN's mother was responsible for private school tuition after February 4.

CJN argues that the HO's decision in favor of CJN created an agreement to change his "stay-put" placement. We disagree. We recognize that federal regulations provide that "if the decision of a hearing officer in a due process hearing conducted by the [state education agency] or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of [stay-put placement]." *34 C.F.R. § 300.514(c)*. But neither of the alternative conditions for a stay-put agreement is met here. Under Minnesota law, the HO decision is conducted by the school district, *Minn. Stat. § 125A.09, subd. 6*, which is considered only a local education agency and not a state education agency, *see Minn. Stat. § 125A.09, subd. 7*; *20 U.S.C. § §*

1401(15)(A), 1401(28). In the second tier of review, the state appoints an HRO, who conducts the review on behalf of the commissioner of the state education agency. *See Minn. Stat. § 125A.09, subd. 9*. Since the HRO denied private placement, there was no agreement to change the stay-put placement here. The district court thus did not err in holding that there was no agreement.

VI.

Judge Bye contends that we are holding that any school district necessarily satisfies its duties to provide a student with a FAPE when a student with a behavioral disability makes academic progress. That is not the case. As we said, academic progress is an "important factor" among others in ascertaining whether the student's IEP was reasonably calculated to provide educational benefit. *Rowley, 458 U.S. at 202*. We believe, as the district court did, that the student's IEP must be responsive to the student's specific disabilities, whether academic or behavioral.

Academic and behavioral matters, however, are not always independent of each other. As we noted in *A.C., 258 F.3d at 776-77*, "social and emotional problems are not *ipso facto* separable from the learning process." Where, as here, the record indicates that a student's behavioral problems, if unattended, might significantly curtail his ability to learn, the fact that he is learning is significant

evidence that his behavioral problems have, at least in part, been attended to. Of course, we wish that CJN had made more behavioral progress, but the IDEA does not require that schools attempt to maximize a child's potential, or, as a matter of fact, guarantee that the student actually make any progress at all. It requires only that the student be provided with an IEP that is reasonably calculated to provide educational benefit and we conclude that that happened here.

Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003), does not cut against our conclusion. In fact, it supports it. In that case, both the state administrative panel and the district court held that the disabled student did not receive a FAPE because his IEPs did not appropriately address his behavioral problems. *Id. at 1026-28*. On appeal, the school district argued that the panel and district court had improperly discounted evidence that some academic progress had been made. *See id. at 1027-29*. We noted that while there was "evidence of some slight academic progress," the evidence was "contradicted by other evidence in the record." *See id. at 1029*. For instance, we observed that every time the student's "special education teacher advanced his work to [his current grade level], the stress engendered resulted in behavioral problems that forced the teacher to readjust his work [downward] to

afford [the student] a measure of success." *Id. at 1029*. We were therefore convinced that the administrative panel had not improperly discounted "the evidence of de minimis academic and social progress where the panel pointed to specific evidence in the record contradicting such a benefit and noted that any slight benefit obtained was lost due to behavior problems that went unchecked and interfered with his ability to obtain a benefit from his education." *Id.* This is in stark contrast to the circumstances in the instant case where there is undisputed evidence that CJN is progressing academically at an average rate, thus indicating, at the very least, that his behavioral problems are being sufficiently controlled for him to receive some educational benefit.

VII.

Accordingly, we affirm the judgment of the district court.

DISSENTBY: BYE

DISSENT: BYE, Circuit Judge, dissenting.

The record in this case portrays a clear contrast. When the District adapted its approach to meet CJN's unique needs, he made some progress on his behavioral disabilities. But when the District expected CJN's behavior

to conform to its structured and inflexible approach, he began to self-destruct. Because the IDEA requires the District to adapt to a child's "unique needs," *20 U.S.C. § 1400(d)(1)*, rather than the child to the District's "normal" approach, I respectfully dissent.

I

I start with a more-detailed explanation of this case's background, based upon the findings of the independent hearing officer (HO).

CJN was born on December 28, 1991. Between the ages of two and four, he suffered from chronic upper respiratory infections and consistent high fevers. During the 1994-95 winter season he experienced four seizures as a result of high fevers. In 1999 he began experiencing headaches. An MRI performed in February 2000 revealed lesions and atrophy in the right frontal lobe of his brain. CJN's brain injury was most likely due to the previous infections, demyelination (nerve damage), or possibly a stroke. The frontal lobe of the brain is associated with self-regulation skills, such as the capacity to inhibit inappropriate behavior, and to control emotions.

CJN's emotional problems began at an early age. When he started kindergarten in February 1998 at Parkview Elementary School, he already had a history of explosive outbursts at home, at pre-school, and at day care, where his

behavior would escalate to the point of threats and violence. His mother requested the District to evaluate him for placement in special education, and he eventually was placed in special education.

CJN's behavior problems continued while at Parkview. Gary Berg, a District employee identified as a "Behavior Person," worked with CJN through kindergarten and first grade. In the beginning of his first grade year, CJN spent a great deal of time in time-outs, which were unsuccessful in regulating his behavior. He was transferred to another teacher and responded more favorably to a behavior program initiated by Berg that utilized replacement behaviors and role-play instead of time-outs. In part, Berg's system allowed CJN to signal when he felt he needed to be out of the classroom. CJN would remove himself from the classroom, and sometimes go visit with Berg, until CJN felt he was ready to return to the classroom.

During the summer between first and second grade, CJN received an occupational therapy (OT) evaluation. The evaluation found CJN had excessive tactile sensitivities (e.g., irritated by labels on clothing), was averse to grooming activities, was overly active, had a moderate to high degree of sensory defensiveness in his reactions to touch, sound, smell, and visual stimuli, and sometimes engaged in self-injurious behavior. The evaluation

recommended "calming activities" to minimize CJN's chances of becoming over-stimulated and leading to an outburst. These calming activities included heavy work to use the large muscles of his body, such as carrying objects, moving furniture, or doing push-ups. The evaluation also recommended oral activities, such as sucking thick substances through a straw, or chewing gum.

At the start of second grade (the 1999-2000 school year) CJN's condition deteriorated. In October 1999 he was removed from school in mid-November while his psychiatric medication was more aggressively introduced, and eventually hospitalized for psychiatric care for nine days, followed by a three-week daytreatment program. When he returned to school in March 2000, Berg suggested that CJN attend a Special Elementary Needs (SPEN) classroom taught by Mary Thompson at Marcy School. CJN spent March, April and May 2000 in Thompson's room, prior to being hospitalized again in May. Ms. Thompson had some success with CJN, describing him as "a beautiful child, very intelligent, very sensitive" but with "very severe needs with lots of sensory issues, and some neurological processing issues." HO Findings of Fact # 42, Add. 13. CJN's placement with Thompson was followed by a successful summer program at Washburn Child Guidance Center, which his mother initiated. She privately hired

Joseph Brown, a school district employee who worked with CJN in Ms. Thompson's classroom, to be CJN's one-on-one aide during the summer program.

In third grade (2000-2001 school year), the Marcy School programs taught by Ms. Thompson moved to Keewaydin School. CJN moved with Ms. Thompson to Keewaydin, and started third grade in her classroom. But after a few weeks, CJN transferred to a special education classroom taught by Elana Schroeder. The District gave two reasons for the transfer. First, the students in Ms. Thompson's classroom were at a lower academic level than CJN (whose academic abilities were average but impeded by his behavioral problems), and the students in Ms. Schroeder's classroom were a closer fit academically for CJN. Second, after a successful spring and summer, CJN's Individualized Education Plan (IEP) team believed he was ready for more responsibility and structure.

His condition quickly deteriorated in Ms. Schroeder's classroom. Despite the prior failures of a time-out approach with CJN, Ms. Schroeder used only a time-out system to handle CJN's behavioral problems. The District failed to implement the mother's recommendations to use the calming techniques recommended in the OT evaluation. The District failed to implement a system with immediate rewards/consequences for appropriate/inappropriate

behavior, or the successful approach used by Berg while CJN was in second grade. The District failed to implement the mother's request for the one-on-one assistance that proved successful during the summer of 2000. Essentially, Ms. Schroeder expected CJN to adapt himself to her structured approach, rather than Schroeder adapting her approach to meet CJN's special needs. The HO concluded "the Student was expected to fit into the program and the program was not adjusted to meet the needs of the Student." HO Conclusions # 12, App. at 61.

Ms. Schroeder apparently did not believe CJN was disabled, but, instead, a manipulative and controlling child. In a phone call during the time CJN was in Ms. Schroeder's classroom, Schroeder told CJN's mother that her claim of frontal lobe brain injury was simply an excuse for allowing CJN to do what he wanted to do.

The results of this combination (an educator who discredited the child's disability *and* expected the child to conform his behavior to the teacher's "normal" approach rather than adjusting her approach to meet the child's unique behavioral needs) were disastrous. CJN's outbursts worsened as a result of the use of time-outs, and the seclusion he experienced. During a fourteen day period in September 2000, CJN spent a part of seven days in seclusion after having been restrained. From October 9 to

November 13, CJN was restrained on more than half of all days, at a rate eleven times greater than other students in Ms. Schroeder's class. CJN would verbally abuse, kick, and spit at District personnel who restrained him. He would threaten his teacher and other students by claiming he would bring a gun or knife to school the following day. The District reached the point where they advised CJN's mother it would resort to police intervention to deal with CJN's outbursts.

On November 16, 2000, that is exactly what happened. With as much time as CJN was spending at school in restraints or seclusion, he understandably would not get off the bus the morning of November 16. He pushed and kicked staff and threatened to kill them. He yelled and threatened peers, and wiped his mucus on them. He continued his outburst after he got to Ms. Schroeder's classroom. Finally, the police were called and removed this third grader from school.

On December 6, 2000, CJN punched a District staff member in the lip. That same day, Ms. Schroeder told CJN's mother that CJN was the problem, that Schroeder had not wanted him in her classroom, and that she would continue to initiate police intervention at every opportunity. The next day, CJN's mother requested an independent evaluation of CJN, objected to police intervention to

address his disability-related behaviors while in school, and asked for a transfer to another classroom. The district finally enrolled CJN in another SPEN classroom at Whittier Elementary on January 16, 2001.

CJN fared no better at Whittier. Whittier also utilized the ineffective time-out system to address CJN's outbursts, with even more serious consequences. CJN attended just seven days at Whittier. On four of those days he was locked in seclusion for excessive periods of time without any criteria for his release, without his mother's consent or authority, and in direct opposition to the opinion of his current mental health provider. Finally, on January 24, 2001, while in the locked seclusion room, CJN attempted suicide by wrapping his shirtsleeve around his neck. The police were summoned again, and removed this third grader from the school in handcuffs. Thus, in five months, while the school used a time-out approach already shown to be unsuccessful during CJN's first and second grades, all the behavioral progress CJN made during the previous spring and summer had been replaced by suicidal ideations. Frustrated with the District's failures, CJN's mother found a private school that could, and did, meet her child's unique behavioral needs. By the time the HO held its hearings in March and April of 2001, CJN had made significant progress at the Calvin Academy. The Calvin Academy

educators had not resorted to locked seclusion or police intervention, the need for even short periods (less than five minutes) of any restraint had substantially subsided, and CJN had less behavioral outbursts at home and an increased interest in learning, friends, and school.

II

Three things concern me about the majority's decision. First and foremost, notwithstanding its assertion to the contrary, I believe the majority decision essentially holds the District can satisfy its duty to provide a FAPE so long as a student with a *behavioral* disability makes *academic* progress. Such reflects a myopic view of the purpose of the IDEA. The educational benefits of an IEP must be reasonably calculated to address more than academic ability or disability. As we stated in *Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769 (8th Cir. 2001)*:

> The IDEA clearly includes "emotional disturbances" as disabilities. *20 U.S.C. § 1401(3)(A)*. According to the Department of Education, an emotional disturbance is
>
> [A] condition exhibiting one or more of the following characteristics over a long period of

time and to a marked degree that adversely affects a child's educational performance:

(A An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C Inappropriate types of behavior or feelings under normal circumstances.

(D A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(c)(4)(i).

Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations. See *Honig, California Superintendent of Public Instruction v. Doe,*

> *484 U.S. 305, 320, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)* (stating, of an emotionally disturbed student, that "it is [the student's] very inability to conform his conduct to socially acceptable norms that renders him 'handicapped' within the meaning of the EHA").

258 F.3d at 775-76.

Even more to the point, we recently decided *Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003)*, which addressed whether FAPE was provided to Robert Clark, a child with behavioral *and* learning disabilities. We concluded that "because the IEPs did not appropriately address his *behavior problem*, Robert was denied a free appropriate public education." *315 F.3d at 1028* (emphasis added). We also addressed whether the administrative hearing panel erred in discounting the slight academic progress Robert had made. We concluded it had not:

> Our review of the record convinces us that the panel did not err in discounting the evidence of de minimis academic and social progress where the panel pointed to specific evidence in the record contradicting such a benefit and

> noted that any slight benefit obtained was lost *due to behavior problems that went unchecked* and interfered with his ability to obtain a benefit from his education.

Id. at 1029 (emphasis added).

As the majority correctly notes, academic progress may be an "important factor" in ascertaining whether an IEP provides educational benefit, ante at 8 (citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982))*, but it is clearly not the only factor. The Supreme Court noted the limited nature of its holding in Rowley, stating:

> One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. . . . We do not hold today that every handicapped child who is advancing from grade to grade in a regular

> public school is automatically receiving a "free appropriate public education."

458 U.S. at 202, 203 n.25.

Rowley also explained that Congress passed the IDEA, in part, so that handicapped children could "achieve a reasonable degree of self-sufficiency" and "become a contributing part of our society." *Id. at 201 n.23.* CJN has a behavioral disability that qualifies him for individualized education under the IDEA, not a learning disability. Thus, behavioral deficiencies, not learning deficiencies, are and will be his obstacle to achieving a reasonable degree of self-sufficiency and contributing to society as an adult. His current ability to read, write, or multiply simply is not the only issue. Therefore, the success of CJN's IEP cannot be measured solely by the maintenance of his academic proficiency, but must include some reference to progress in teaching him to control his behavior.

If a child has a speech impediment that qualifies him for special education services, we do not measure the educational benefit he derives from attending speech therapy solely by his progress in math class. Or if a child qualifies for special education because of a reading impairment, we do not measure the educational benefit she derives from a remedial reading course by how well-

behaved she is. And if the student was well-behaved prior to receiving special education services, but her IEP failed absymally to address her reading impairment, we would not conclude the child received an educational benefit because she is still well-behaved.

Likewise, we cannot address the propriety of CJN's IEP, or the District's provision of a FAPE in this instance, solely by CJN's performance in math or English or Geography. Rather, in determining whether the District provided a FAPE, we must also determine whether CJN received any benefit from the District in learning to control his behavior. Unlike Amy Rowley's IEPs, which were not and could not be directed towards improving her hearing but merely ensuring that her deafness did not stand in the way of an "adequate" education, *Rowley, 458 U.S. at 210*, the goals and directives of CJN's IEPs were all directed towards teaching emotional, behavioral, and social skills,[2]

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[2] For example, CJN's IPE dated October 10, 2000, contains the four following goals:

> Goal 1: [CJN] will continue to improve his ability to maintain selfcontrol and act appropriately in the school setting.

not academics. The record is replete with evidence that the District's use of a time-out system to restrain and control CJN's behavior failed. The District's approach to CJN's unique disability was counter-productive and actually exacerbated his behavior problems. There is no evidence the time-out system and use of restraints taught CJN to control his behavior.

> Goal 2: [CJN] will improve his ability to complete work, comply with requests, follow directions and participate appropriately in class activities.
>
> Goal 3: [CJN] will work toward independently solving problems in a positive manner by using common sense and anger management techniques.
>
> Goal 4: [CJN] will develop skills to build and maintain friendships and to recognize his own self-worth.

Nor is there evidence the District's ultimate resort to police intervention would ever teach CJN how to become a productive member of society.[3]

Second, I am troubled by how easily the HO's findings and conclusions were disregarded by the hearing review officer (HRO), the district court, and this court. We can engage in a semantical debate about which portions of the HO's decision were "findings of fact" and which were "conclusions of law." But the ultimate question whether FAPE has been provided is a mixed question of law and fact, as the majority recognizes. See ante at 7 (citing *Strawn v. Missouri State Bd. of Educ., 210 F.3d 954, 958 (8th Cir. 2000)).* In cases where a state has a two-tier administrative system, and the courts are asked to review a conflict between the findings and conclusions of the two tiers, I believe we should defer to the administrative body that actually had an opportunity to observe the witnesses.

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[3] On this first point, I would add the following: the rapidity of CJN's decline makes it abundantly clear that it was just a matter of time before CJN's academic progress would have been affected by the District's approach to his behavioral disability. At the end he was, after all, spending half his time outside the classroom locked up, and so despondent that he attempted suicide.

See *Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997).*

Our statement in Fort Zumwalt that a "court may choose to credit the hearing panel's findings based on observations of the witnesses and reject the reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators," *id.*, states only half the equation. In Fort Zumwalt we were faced with a conflict in which the first tier of the administrative process sided with the professional educators, and the second tier against them. See *id. at 611.* If the opposite had been true, as it is in this case, we might as easily have said a court may choose to credit the hearing panel's dismissal of the views of the professional educators, and reject the reviewing officer's analysis in their favor, based upon the hearing panel's ability to observe the witnesses. In other words, our deference when reviewing a conflict between the first and second tiers of an administrative process should turn upon one tier's ability to observe the demeanor of the witnesses, not upon whether the reviewing tier sides for or against the educators (i.e., does or does not give sufficient weight to the views of professional educators). In this case, the HO had the ability to observe the witnesses, not the HRO. The fact that the HO discredited the views of the school authorities, while

the HRO gave them more weight (just the opposite of what occurred in Zumwalt) should not affect which administrative body we defer to when reviewing a conflict between the two.

Finally, I fear we allow Minnesota's education system to take a step backward with our tacit approval of the District's use of restraint to cope with CJN's behavioral outbursts. The HO concluded the District failed to comply with certain state standards governing the use of punitive and aversive deprivation procedures. Specifically, the HO found the District failed to comply with Minn. R. 3525.0850, which requires that the "objective of any behavioral intervention must be that pupils acquire appropriate behavior and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination."

The HO also found the District failed to comply with Minn. R. 3525.1400, which requires that pupils receive education in "an atmosphere that is conducive to learning; and meet the child's special physical, sensory, and emotional needs." These administrative rules were adopted pursuant to *Minn. Stat. § 121A.67*, which requires the rules to "promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures."

The District must meet the standards of the state's educational agency as an integral part of providing FAPE. See *Rowley, 458 U.S. at 203* (holding that instruction and services "must be provided at public expense, *must meet the State's educational standards*, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP" in order to qualify as FAPE) (emphasis added); see also *20 U.S.C. § 1401(8)(B)* (defining "free appropriate public education" as "special education and related services that . . . meet the standards of the State educational agency").

The HO concluded that CJN "was trapped in an increasingly punitive approach to disciplining, which resulted in increasing the levels of isolation, time-out and locked seclusion." HO Conclusions # 12, App. at 61. Neither the district court or the HRO addressed the HO's conclusion that the district violated Minn. R. 3525.0850 & 3525.1400 with its "increasingly punitive approach to disciplining." Furthermore, I find most disconcerting this court's attempt to explain away the District's violations by suggesting that CJN's mother was the obstacle to the adoption of an appropriate behavioral intervention program (BIP). My review of the record indicates that CJN's mother opposed the BIPs suggested by the District precisely because they violated Minnesota law.

I am discouraged by this court's tacit approval of the use of counter-productive and punitive disciplinary measures. We are essentially telling school districts that its copacetic to deal with students with behavioral disabilities by punishing them for their disability, rather than finding an approach that addresses the problem. We also tacitly approve the District's resort to police intervention for the behavioral problems it helped create by failing to address CJN's unique behavioral disorder. That is clearly not a message this court should dispatch.

I commend CJN's mother for her wisdom in removing CJN from the destructive downward spiral created by the District's inability to address her son's unique educational, behavioral needs. She should now be reimbursed under the IDEA, pursuant to *20 U.S.C. § 1412(a)(10)(C)(ii)*, for her decision to enroll her son in a private school capable of providing her son with an appropriate education.

Nº 01-1305 ADM/AJB

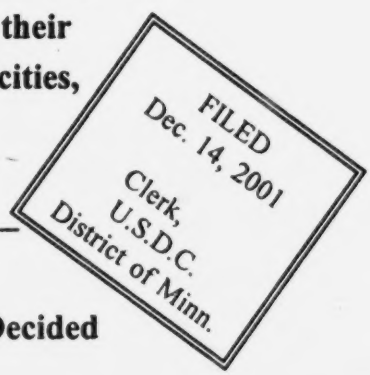
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

CHRISTOPHER JAMES NYGREN,
by and through his Parent
and Natural Guardian,
Sharon Kay Nygren,
Plaintiff,

v.

MINNEAPOLIS PUBLIC SCHOOLS,
Special School District No. 1, the
Minneapolis Board of
Education, Catherine Shreves,
Chair, and Carol Johnson,
Superintendent, in their
representative capacities,
Defendants.



December 14, 2001, Decided

DISPOSITION: Plaintiff's Motion for Judgment on the Record DENIED.

COUNSEL: Amy J. Goetz, Esq., St. Paul, Minnesota, for Plaintiff.

Laura Tubbs Booth, Esq., and Karen A. Janisch, Esq., Rider Bennett Egan & Arundel, LLP, Minneapolis, Minnesota, for Defendants.

JUDGES: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

OPINIONBY: ANN D. MONTGOMERY

OPINION:

MEMORANDUM OPINION AND ORDER

INTRODUCTION

On October 30, 2001, the undersigned United States District Judge heard Plaintiff Christopher James Nygren's ("Student") Motion for Judgment on the Record [Doc. No. 25]. For the reasons set forth below, the motion is denied.

BACKGROUND

The Individuals with Disabilities Education Act ("IDEA"), § § *20 U.S.C. 1400 et seq.*, requires states to provide disabled children with a "free appropriate public education." *Id.*

§ 1401(a)(18). To provide a "free appropriate public education" ("FAPE"), a school must formulate an individualized education plan ("IEP") tailored to the disabled child's unique needs. *20 U.S.C. § 1412.* A school meets its obligation if the disabled student's IEP is "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 207, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982).* As long as the student is making educational progress from his schooling, the educators may determine the appropriate methodology. *See Rowley, 458 U.S. at 208.*

Student, through his mother, Sharon Nygren ("Parent"), requested review of a final administrative decision determining that the proposed placement of Student was reasonably calculated to provide him a FAPE. During the relevant time period, Student was enrolled in the Minneapolis Public Schools ("School"). The School identified Student as a child in need of special education services because of his behavioral disability. He has a history of severe emotional and behavioral problems. *See* IHO 1, 4. Nevertheless, Student continued to make reasonably expected academic progress while attending

classes at the School. *See* HRO 21, 25, 26; T., at 483-87; 555; 852-54.[1]

The School developed an IEP for Student using an IEP team. Parent was given full participation rights as an IEP team member as required by the IDEA. *See* HRO 14. The School provided a FAPE to Student during the 1997-98 school year. *See* IHO 11; HRO 15. Student continued at the School as a first-grade student during the 1998-99 academic year. The IEP team met and developed a new IEP for Student. *See* IHO 19. Student received a FAPE during his first-grade year, 1998-99. *See* IHO 11; HRO 15. By further formulating his IEP, the School provided a FAPE to Student during his second-grade year, 1999-2000. *See* IHO 11; HRO 15.

Student began third grade in the academic year 2000-01. He enrolled in a Special Program for Elementary Needs ("SPEN") classroom at Keewaydin Elementary School. *See* IHO 58. The School held numerous planning and IEP team meetings for Student in Fall, 2000. The IEP team met to assess the educational opportunities provided to Student on August 29, August 31, September 12, October 10, November 7, November 14, 2000, and on January 9, and March 2, 2001. *See* HRO 19. During this process, the

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[1] References to the impartial hearing officer's decision will be "IHO, ," while references to the hearing review officer's decision will be "HRO, ." References to the Transcript will be "T., at ."

School afforded Parent full participation rights as an IEP team member. *See id.* 14. Parent's ideas were not always adopted by the IEP team. *See id.* 20.

On December 7, 2000, Parent unilaterally removed Student from the Keewaydin Elementary School. T., at 2970. Because Parent refused to return Student to Keewaydin, the School offered to place him in a SPEN classroom at Whittier Elementary School. IHO 202. After the winter holiday break, the team agreed to a new IEP and Student's placement at the School's Whittier SPEN classroom on January 18, 2001. *Id.* 205, 212. On January 24, 2001, Student had a serious behavioral incident. *Id.* 134. On January 26, 2001, Parent removed Student from the SPEN classroom at Whittier. *Id.* 194. At Parent's suggestion, the School agreed to provide Student homebound academic instruction.

During Student's time at Keewaydin and Whittier, there is credible evidence in the record that the School provided Student with a suitable IEP designed to impart meaningful educational benefit to him. *See* HRO 16. The School provided Student with instruction programs specially designed to meet his unique needs. *See id.* 21. Included along with his tailor-made plan, the School allowed Student reduced homework assignments, more time to complete his assignments, separate space in the classroom, positive reinforcement for meeting minimal requirements, a token economy system for reinforcing behavior, and time-

out periods to calm himself. *Id.* The School's educational services afforded Student reasonable opportunities to earn academic progress. *See id.* 21, 22, 23, 24. Independent examinations demonstrated that Student's academic achievement was in the average range. *See* IHO 89; T., at 483-84.

On February 20, 2001, the Parent unilaterally removed Student from the School and enrolled Student in a private school, Calvin Academy. IHO 139-40. Calvin Academy serves disabled students and "at risk" students. T., at 2719-20. As a private school, it offers one-on-one academic instruction. *Id.* at 1967. The majority of Student's day at Calvin was spent in isolation from other students. *Id.* at 2850. Student continued to exhibit significant behavioral problems at Calvin Academy. *Id.* at 2841-42, 2859.

Parent initiated this action against the School on Student's behalf, seeking reimbursement for Student's tuition at Calvin Academy.

DISCUSSION

The Hearing Review Officer ("HRO") determined [*6] that the School's proposed placement of Student was reasonably calculated to provide him a FAPE. The HRO denied Student an award of retroactive and prospective tuition for Calvin Academy. Student appeals the final administrative decision of the HRO under the IDEA, *20 U.S.C. § 1415*(h)(2)(A).

Minnesota has a two-tier administrative hearing process. An Independent Hearing Officer ("IHO") holds an impartial due process hearing and issues a decision. *See* Minn. Stat. § 125A.09, subds. 6-7. If a party appeals the IHO's decision, the HRO reviews the entire administrative record. *Id.* § 125A.09, subd. 9. The HRO is authorized to seek additional evidence and provide the parties an opportunity for written or oral argument. *Id.* The HRO then issues "a final independent decision based on an impartial review of the [IHO's] decision and the entire record." *Id.*

Both the IHO and the HRO found that the School provided a FAPE to Student through September, 2000. *See* HRO 15. The IHO, however, concluded that the School failed to design an appropriate IEP to meet Student's needs after September, 2000. *Id.* 16. The HRO reversed, finding that the School developed and implemented an appropriate IEP for Student's 2000-01 school year, thereby providing a FAPE to Student. *Id.* 24, 25. The HRO also found that by unilaterally removing Student from the classroom, Parent denied the School the opportunity to continue to assess and refine Student's IEP. *Id.* 26. Accordingly, the HRO held that reimbursement for Student's tuition for private school placement at Calvin Academy was not warranted. *Id.* 28.

Judicial review of the HRO's decision under the IDEA is limited because judges are not trained educators. *E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998).* On appeal, the party challenging the outcome of

state administrative hearings has the burden of proof. *Id.* A district court must give "due weight" to the results of the administrative proceedings, but make an independent decision of the issues based on a "preponderance of the evidence." *Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996).* The level of deference accorded to the administrative proceedings is less than required under the substantial evidence test commonly applied in federal administrative law. *Id.* However, a court must resist any impulse to "substitute [its] own notions of sound educational policy for those of the school authorities." *Rowley, 458 U.S. at 206.*

Based upon a preponderance of the evidence, giving due weight to the HRO's decision, the Court finds that the School provided Student a FAPE for the academic years 1997-98, 1998-99, 1999-2000, and 2000-01. The School formulated and implemented an IEP designed to supply Student with meaningful educational benefits and opportunities. With Student's behavioral challenges in mind, the team tailored the IEP to his needs. Parent participated in this process. That the IEP team did not always endorse Parent's ideas does not mean an IDEA violation exists. "Parents, no matter how well-motivated, do not have a right under [the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." *Lachman v. Illinois St. Bd. of Educ.,*

852 F.2d 290, 297 (7th Cir. 1988) (citing *Rowley, 458 U.S. at 207).* Under the circumstances, Parent's opportunity to participate in the formulation process of Student's IEP was not "seriously hampered." *S.D., 88 F.3d at 562.*

At numerous meetings, Student's IEP team was continually making efforts to refine his instruction programs. Student was learning within the average range in his academic subjects, thus demonstrating educational progress. The IDEA does not require the School to provide Student with "the best possible education at public expense." *Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 612 (8th Cir. 1997).* Nor does the IDEA compel the School to maximize Student's potential and achieve outstanding results. *Id.; E.S., 135 F.3d at 568.* As long as Student was benefitting from his educational instruction, the authority is left to the School to determine the appropriate methodology. *See Rowley, 458 U.S. at 208.* The record indicates that the School reasonably calculated Student's IEP to enable him to receive educational benefits. Thus, the School was providing Student with a FAPE. The HRO's decision is affirmed.

The HRO's decision denying reimbursement for summer school costs is also affirmed. When Parent withdrew Student from public school placement, she denied the School the opportunity to determine whether or not "Extended School Year" services were necessary for Student. Thus, the School did not fail to provide a FAPE to

Student because the IEP team was unable to assess Student's need for summer school.

When Parent unilaterally placed Student in Calvin Academy, she did so "at [her] own financial risk." *Burlington v. Department of Educ., 471 U.S. 359, 373-74, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985).* Because Student's public school placement was not in violation of the IDEA, Parent is not entitled to tuition reimbursement for private school placement. *See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 10, 126 L. Ed. 2d 284, 114 S. Ct. 361 (1993).* Just as *Lachman, supra,* determined that parents may not dictate a specific program or a specific methodology be employed to teach their child, so too is a parent lacking the right to choose a private school for her child at public expense. The HRO's denial of an award for retroactive and prospective tuition at Calvin Academy is affirmed.

The IDEA enacted a strong preference that handicapped children attend regular classes with children who are not handicapped. *See id.* § 1412(5). This creates a presumption in favor of Student's placement in the public schools. *See Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52, 54 (8th Cir. 1986).* In August, 2001, following a preliminary injunction hearing, the School and Plaintiff entered into a settlement agreement to resolve the issue of where Student would attend school during the pendency of this action. The School agreed to reimburse Parent for

tuition at Calvin Academy through February 4, 2002. The parties further agreed to use the IEP team process to transition Student back into the public schools. Accordingly, the School will not be responsible for reimbursing tuition at Calvin Academy after February 4, 2002. In the event that Parent chooses to place Student in private school after that date, she will not be entitled to tuition reimbursement.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Judgment on the Record [Doc. No. 25] is **DENIED**.

BY THE COURT:

/S/ ANN D. MONTGOMERY

UNITED STATES DISTRICT JUDGE

STATE OF MINNESOTA

DEPARTMENT OF CHILDREN, FAMILIES AND LEARNING

In the matter of the Appeal of

Christopher Nygren (File No. 409-2]

v.

FINDINGS OF FACT, CONCLUSIONS AND DECISION

Minneapolis Public School, Special School District No.1.

CASE AND PROCEDURAL HISTORY

A due process hearing in the above-entitled matter was held on March 13-17, April 7-9, and April 16, 2001, before Independent Hearing Officer Robert J. Miller (hereafter "IHO") pursuant to the provisions of Minn. Stat. Sec. 125A.09.

Attorney Amy Goetz, Center For Education Law, LTD., 607 Grand Ave. So., Suite 200, St. Paul, MN 55102, appeared on behalf of Christopher Nygren (hereafter

"Student"). Attorneys James C. Selmer, Marc Befg, and Nathan Krahn, James C. Selmer & Associates, P.A., 601 Second Ave. So., Suite 3250, Minneapolis, MN 55402. appeared on behalf of Minneapolis Public Schools, Special School District No. I (hereafter "District").

The issues considered by the IHO at the due process hearing were:

1. Whether the District denied the Student's parent full participation as an Individualized Education Plan (hereafter: "IEP") team member: as required by the Individuals with Disabilities Act (hereafter: ""IDEA");

2. Whether the District failed to adequately evaluate the Student's needs for special education and related services as required by the IDEA;

3. Whether the District failed to provide the Student with an IEP designed to meet his unique educational needs, thereby depriving him of a free and appropriate public education (hereafter "FAPE") as required by the IDEA and Minnesota state law; and

4. Whether the District failed to consider, utilize, coordinate with or implement the services and recommendations of various public agencies and services providers as required by the IDEA.

The IHO issued Findings of Fact, Conclusions of Law, and Decision on May 7. He found that:

1. The Student was denied FAPE and meaningful education benefit from September 2000 to February 14, 2001; and

2. The Student was denied an opportunity to participate in Extended School Year (hereafter "ESY") services for the summers of 1998, 1999, and 2000; and that the District has not agreed or disagreed to ESY for the summer of 2001 in a timely manner.

The IRQ ordered the District to:

1. Reimburse the Student's parent for the cost of educational services for the Student at the Calvin Academy from February 22, 2001 until the end of the: 200 1 academic year;

2. Pay for ESY services at the Calvin Academy for the summer of 2001;

3. Place the Student at the Calvin Academy at District expense for the 2001 and 2002-2003 academic school years, after which the Student's IEP team is to meet to decide on the most appropriate placement for the Student; and

4. Reimburse the Student's parent for personal costs of $3,495.75 incurred over the summers of 1998,1999, and 2000 in providing education services to the Student.

On appeal, the District alleges:

1. The IHO erroneously concluded that the Student was denied FAPE during the September 2000 to February 2001 time frame;

2. The IHO erroneously determined that the District failed to provide the Student with an appropriate IEP during the September 2000 to February 2001 time frame; and

3. The award of two-and-a-half years of tuition at the Calvin Academy and reimbursements for ESY services and non-ESY compensatory education is neither appropriate nor justified.

Pursuant to Minn. Stat. Sec. 125A.O9, Subd. 9, and based upon the standards set forth in Minn. Stat. Sec. 125A.O8 and Minnesota Rules Chapter 3525, HRO has:

1. Examined the entire record of the proceeding;

2. Afforded the parties an opportunity for written argument;

3. Determined that the proceedings at the hearing level were in accordance with the requirements of due process;

4. Rendered a decision within the statutorily required time period; and

5. Served this Decision upon the Commissioner of CFL and upon the parties.

Based upon an impartial review of the entire record including the IHO's decision and written arguments of counsel, Hearing Review Officer (hereafter "HRO") makes the following independent:

PROCEDURAL FINDINGS

1. By Notice dated June 5, 2001, District appealed the IHO's decision to the Commissioner of Children, Families, and Learning, who appointed HRO on June 5, 2001.

2. District filed an Appellate Brief on June 15, 2001.

3. Student filed a Response to District's Appellate Brief on June 25, 2001.

FINDINGS OF FACT

After a thorough review of the entire record, the HRO finds that the IHO's Findings of Fact 1-85,87-96,98-140, 142-148, and 150-290 are supported by the preponderance of the evidence in the record, and hereby adopts and incorporates those findings by reference. As they

constitute 51 pages, they will not be repeated herein. In addition, the HRO makes the following Findings of Fact:

1. Dr. Don Allen, Ph.D. is an assistant director of special education with the District (Tr. 1891). He holds a Ph.D. in school psychology. (Tr. 1895-1896). Dr. Allen is an expert in the field of special education and has extensive experience in working with children with disabilities (Tr. 1897-1898).

2. According to Dr. Allen, the preparation of an IEP is a generally fluid process; meaning that it is supposed to be flexible and able to change (Tr. 1938). The District attempted to obtain input from as many people as possible regarding the Student's needs for the creation of the Student's IEP (Tr. 1939).

3. Dr. Allen believes the IEP is an appropriate plan for the Student because of its proactive and positive focus, and the fact that it provides the Student with more structure and monitoring to help catch his behavior before it explodes (Tr. 1942).

4 The March 2, 2001 IEP would also use a token economy, similar to what had been used before with the student (Tr. 1942). The purpose of this system is to encourage desired behaviors and support those desired behaviors (Tr. 1944).

5. The March 2, 2001 IEP team also discussed the use of conditional behavior intervention procedures, their use at Keewaydin and Whittier schools with the time-out room, and the variable success in getting the Student to calm down (Tr. 1944- 1946). The primary goal of such measures is to protect the Student and the people around him (Tr. 1946-1947). The goal of trying to deal with the Student is to determine what is setting him off, but no system is fail-safe and able to solve the problem (Tr. 1947-1948). The fact that the Student would still have explosions of destructive behavior is not necessarily an indication that the program is inappropriate for the Student. (Tr. 1948- 1949)

6. Dr. Allen believes that the District took steps to develop appropriate supports in the IEP to address the Student's behaviors (Tr. 1948-1950). The March 2, 2001 IEP took into account the evaluations and recommendations of Dr. Zieglert's Independent Education Evaluation (hereafter "IEE") report, and Dr. Allen agrees with Dr. Ziegler that

the Student's behavior can be managed with intense behavior modification (Tr. 1952).

7. When there were concerns at Keewaydin about the Student's behavior, the approach was changed to address the extended behavioral outbursts and to consider other options (Tr. 1955-1956).

8. The March 2, 2001 IEP team considered all the information available and recommended a Level IV setting for the Student, which is the next highest step in terms of intensity and structure (Tr. 1958-1959). The team approached the issue by first determining what the Student's needs were and then determining where best to try to meet those needs (Tr. 1960-1961). The District's goal is to use the least restrictive environment for a student, and a student is moved to a more restrictive environment only when absolutely necessary (Tr. 1961). The March 2, 2001 IEP recommends a Level IV setting, which may or may not be at Crawford (Tr. 1969). Although Crawford would be able to provide more mental health services to the Student than his current placement, the District was being flexible and attempting to leave open the issue of placement on the March 2, 2001 IEP for discussion and

input by not filling in "Crawford" as the placement choice (Tr. 2009).

9. Dr. Allen testified that, at the November 14, 2000 meeting that he attended, other placements were discussed but the topic was dropped because the Parent explained that the Student needed consistency and should be at Keewaydin (Tr. 2039).

10. Dr. Allen testified that, while the Student's behaviors might be tied to a particular cause, those causes were not identified (Tr. 2049). There might be some contribution from certain factors but determining the actual cause was something that the IEE assessments attempted to do (Tr. 2050).

11. Dr. Ziegler first recommends that the Student receive in-home counseling or therapy from a therapist that specializes in behavior modification (Tr. 303-304). Second, Dr. Ziegler recommends that the Student receive one-on-one teaching in a very structured setting (Tr. 304-305). This should continue until the Student is able to show that he is able to survive in a less-structured setting

(Tr. 305). Dr. Ziegler believes that a SPEN program is inadequate for the Student since, empirically they have been in the past (Tr. 306). Third, Dr. Ziegler recommends that the Student receive intense behavior modification (Tr. 304). Behavior modification would be an environment in which the child would have a reinforcement schedule based on the exhibition of certain desired or undesired behaviors (Tr. 306).

12. Dr. Ziegler believes that while the District may have offered these things, they have not offered them to the point where the Student's behavior has been brought under control (Tr. 304).

13. Dr. Ziegler admits that sometimes children must be restrained, no matter what the plan, for their own safety (Tr. 307). He testified that the District's treatment of the Student was not negligent or neglectful, but rather was simply not working (Tr. 327- 328). He recommended a Level V [now a Level IV setting under new guidelines] setting generally and ECHO-Winnetka specifically, because he has some experience with that program; but that is not a judgment on the appropriateness of Crawford, or ***SoDe Oilier*** facility, as a placement option (Tr. 327-329).

14. Dr. Ziegler recommends intense behavior modification techniques, pharmacological management, and a one-to-one educational setting (Tr. 335). Whether intense behavior modification will be successful is in some part the responsibility of the Student (Tr. 336). Behavior modification must be managed very carefully to prevent regression and dependency (Tr. 339-340).

15. Dr. Ziegler is not sure whether alternative methods of intervention would have prevented the Student from escalating his behavior (Tr.412).

16. Dr. Ziegler has difficulty finding "positive reinforcement procedures" as he defines them in the records of the Student, but does not reference the various token economy and point systems that the Student used (Tr. 413).

17. Dr. Ziegler testified that not everything can be blamed on inappropriate treatment, since the Student presents a very complex behavioral picture (Tr. 416). There are no records to suggest that the Student's behaviors can be predicted (Tr. 418).

18. Dr. Ziegler testified that simply because the Whittier staff tries a certain approach in dealing with the Student, there is no guarantee that it will be successful (Tr. 479).

19. Dr. Ziegler admits that it is possible for a plan to be appropriate, but still turn out disastrously (Fr. 497).

20. Mary Ellen Thompson is a Special Program for Elementary Needs (hereafter "SPEW") teacher at Keewaydin and followed the Student to Keewaydin from Marcy Open School (Tr. 1754-1757). According to Ms. Thompson, the parent requested that the Student be placed with Ms. Thompson at Keewaydin SPEN in the fall of 2000 (Tr. 1759). The Student moved to Elena Schroeder's classroom because of his higher level of academic functioning (Tr. 1759-1760). Ms. Thompson described the Student as a very intelligent and sensitive child with severe needs, as having sensory issues and neurological issues, as controlling and manipulative, as having a lot of anger and anxiety issues, and as having a lot of behaviors that get in the way of his success (Tr. 1760-1761). Ms. Thompson said that it is best to try to catch the Student before he becomes out of control (Tr. 1761).

21. The Student did make academic progress in Ms. Thompson's class at Marcy (Tr. 1761). At Keewaydin, the Student was only in her class for a few weeks, but nonetheless, Ms. Thompson noted academic improvement, especially in reading (Tr. 1767). She described the Student as having strings of good days without major behavior problems (Tr. 1762). She made some accommodations for the Student like allowing him to use a computer, instead of writing, which the Student did not like to do (Tr. 1762). She also used a bag of items to distract, stimulate, or calm the Student (Tr. 1764-1765). She said that at Marcy, the Student had his own area of the class to go to when he felt that he needed to and could go to other places to be with an adult to relax (Tr. 1765). She said that there was a lot of progress made in the Student, realizing when he needed to have a timeout, but that progress was inconsistent (Tr. 1765). The Student showed poor social judgment and would interpret other people's actions improperly, and then react to his perceptions (Tr. 1765).

22. Ms. Schroeder is a SPEN teacher at Keewaydin and had the Student in her class from September 16, 2000 to December 6, 2000 (Tr. 2317). She is licensed in emotional behavioral disability (hereafter "EBD"). Learning

disabilities and art, and she has been an EBD teacher for 18 years, including the last nine years at Keewaydin (Tr. 2319).

23. Ms. Schroeder described her classroom as being highly structured and built on a positive reward system that is set up for each student (Tr.2321). The focus is individualized on each student's academic need and attempts to mainstream into regular education classes when possible (Tr. 2321).

24. Ms. Schroeder took all of the regular steps to acclimate the Student to the classroom (Tr. 2329). It was explained to the Student how the stop and think process worked and how the reward system worked (Tr. 2329). They practiced time-outs and the Student also used, as an accommodation, a pro-board to type some of his work instead of writing it out (Tr. 2329).

25. The Student was making progress in Ms. Schroeder's class from September 16, 2000 to December 6, 2000, in the sense that he was asking other students to do things with him during free time, and his writing skills were improving (Tr. 2337). However, the procedure with respect to the

behavior was to get the student to stop the undesired behavior by first asking the student to stop and use the words "first request," next change the focus by showing an example to the student of positive behavior, then ask the student not to do the behavior using the words "second request;" next the Student would be asked to take a stop and think, and if the behavior escalated, the Student is taken to a time-out (Tr. 2338-2339). If aggressive behavior is occurring, the student goes straight to time-out and may skip a step in the progression (Tr. 2341).

26. Ms. Schroeder confirmed that there was about a three week period in which there were no major behavioral incidents and that the Student was making academic, social, and behavioral progress (Tr. 2345).

27. Ms. Schroeder testified that the Student had the ability to comply with what he was being asked to do (Tr. 2432). The Student was successful off and on using stop and think (Tr. 2434).

28. Ms. Schroeder changed her classroom setup to accommodate the Student by allowing the Student more time to finish work, assigning the Student less work, and

positively reinforcing the Student for meeting very minimal requirements, which was not done for other students in the classroom (Tr. 2489). The Student slowly made progress academically and behaviorally (Tr. 2489-2490). The staff would also allow the Student a longer time period to try to calm himself (Tr. 2500). The staff would negotiate the amount of work that the Student needed to complete before he could earn a break with other students (Fr. 2500).

29. The Student's reaction to being re-directed verbally was variable, and he appeared to be able to use a writing utensil (Tr. 2496). The Student did have days where he tried very hard and days when he had made up his mind to have a good, productive day (Tr. 2497). The Student was able to control his behavior, because he did control his behavior when he wanted to (Tr. 2497).

30. Ms. Kristi Ward was the SPEN teacher during the Student's time at Whittier School (Tr. 1538-1539). She is a licensed EBD teacher and has been at Whittier since 1997 (Tr. 1539). Her duties as an EBD SPEN teacher is to prepare academics that meet the individualized needs of all of the students, including designing academics in the areas

of reading, writing, math, social studies, science, and a special social skills class (Tr. 1542).

31. The Student started at Whittier on January 16, 2001 (Tr. 1553).

32. Ms. Ward's goal in the first 30 days that the Student would be in her classroom would be to get to know and understand the Student as well as possible while acknowledging that there: are environmental and adjustment issues. (Tr. 2156-2157) Since the Student was only in Ms. Ward's class for a total of seven days, she did not really have an opportunity to work with him as she would have liked. (Tr. 2157)

33. Ms. Ward described the point reward system in her classroom as a positive behavior intervention program and it was this program that the Student was a part of while in Ms. Ward's classroom. (Tr. 2176-2179) She also kept logs on the Student regarding his behavior and progress. (Tr. Z 179-2188)

34. Ms. Ward was in the process of developing a Behavioral Intervention Plan (hereafter "BIP") for the

Student at the time he was suspended on January 24, 2001, and did not return to school. (Tr. 2202)

35. The Student currently attends classes at Calvin Academy. (Tr. 2676) On or about January 3, 2001 the Student and his parent toured the school. (Tr. 2687) The school was told approximately 10 days following the January 3 visit that the Student would be attending there. (Tr.2689) The Student may have begun attending Calvin Academy on January 17 or 18, 2001. (Tr. 2689)

CONCLUSIONS OF LAW

1. The Commissioner of CFL and the IRO have jurisdiction in this matter pursuant to 20 V.S.C. Sec. 1415. Minn. Stat. Sec. 125A.09 and Minn. R. 3525.4600.

2. The matter is properly before the HRO pursuant to Minn. Stat. Sec. 125A.09 and Minn. R. 3525.4600.

3. The Notice of hearing in this matter was proper in form and content and the District has complied with all relevant substantive and procedural requirements of statute and rule in both hearing and appeal.

4. The HRO has conducted an impartial review based upon the entire record pursuant to 20 U.S.C. Sec. 1415(8); Minn. Stat. Sec. 125A.O9, Subd. 9; and Minn. R. 3525.4600. In conducting this review, the IRO considered the Findings of Fact, Conclusions and Decision of the IHO and gives due weight to the IHQ's Findings that were based upon the credibility of the witnesses who testified at the due process hearing. Carlisle Area School Dist. v. Scott P., 23 IDELR 293 (3m Cir. 1995); ISD 283 v. S.D., 88 F. 3d 556 (Slit Cir. 1996). Upon completion of the hearing review. HRO rendered an independent decision.

5. The HRO rendered a decision within the statutorily required time period.

6. The Student is a 9-year-old child with disabilities as defined by Minn. Stat. Sec. 12SA.02 and is entitled to special education services appropriate to his needs pursuant to the IDEA, 20 U.S.C. 1401(3) and regulations enacted thereunder and Minn. Stat. Sec. 125A.17 and rules enacted thereunder.

7. The District bears the burden of proof as to all facts and as to the grounds for the proposed actions. Minn. R. 3525.4300. The burden of proof is upon the District to show by a preponderance of the evidence that its proposed actions are appropriate and provide the Student with FAPE. Minn. R. 3525.4400, Subp. 3.

8. FAPE consists of special education and related services that:

a. have been provided at public expense, under public supervision and direction and without charge;

b. meet the standard of the State Educational Agency;

c. include an appropriate preschool, elementary of secondary education in the state involved; and

d. are provided in conformity with the individualized education program required under Sec. 1414(1)(5) of this title.

20 U.S.C. Sec. 1401(8); 34 C.F.R. Sec. 300.8.

9. The U.S. Supreme Court has determined that FAPE "consists of educational instruction specifically designed to meet the needs of the handicapped child. supported by such services as are necessary to permit the child to benefit from

the instruction." Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 175. 188-9 (1982); see also Glazier v. Independent School District No. 876, 558 N. W. 2d 763. 767 (Minn. App. 1997) (citing Rowley standard).

10. Rowley does not contemplate the consideration of parental preferences in the determination of whether FAPE has been provided. The proper focus is whether the proposed personalized instruction is reasonably c alculated to provide the student with an educational benefit.

11. An "appropriate" public education does not mean the best or potential-maximizing education for the individual child. Independent School Dist. No. 281 v. S.D.. No. 952497 (8th Cir. 1996). It merely means that the child will receive an appropriate education. meaning one that will allow the student to benefit from his or her education. Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997). A school district is not required to "cure the disabilities which impair a child's ability to learn." Independent School Dist. No. 83 v. S.D. No. J.D., 948 F .Supp. 8 60, 8 85 (D. M inn. 1 995), a ffirmed 8 8 F .3d 556 (8th Cir. 1996)

12. The IDEA does not require that a school district guarantee that an IEP will work or will confer educational benefit, but only that it be designed to permit the student to receive educational benefit. See. Bd. of Education of Downers Grove School Dist. v. Steven L., 898 F.Supp. 1252, 1261 (N.D. Ill. 1995).

13. Rowley prohibits the HRO and IRQ from imposing educational methodology upon a school district. This HRO cannot substitute his judgment for that of the IEP team, but should limit his focus to the appropriateness of the program offered by the District. Rowley, 458 U.S. at 207.208.

14. The IHO determined and the record supports that the Student's parent was afforded parental rights and full participation as an IEP team member as required by the IDEA.

15. The IRQ determined, and the record supports, that the District provided the Student with FAPE until September 14, 2000.

16. The IHO determined that the District failed to provide the Student with an appropriate IEP designed to meet his unique educational needs from September, 2000 forward and thereby failed to confer meaningful educational benefit to the Student or to provide him with FAPE. However, there is credible evidence in the record that the District provided the Student with an appropriate IEP designed to confer meaningful educational benefit to the Student.

17. In support of his determination, the IRO stated that the IEP team failed to undertake any analysis of the relationship between the Student's behavior and disciplinary exclusions. However, the record shows that prior to the Student's entry into the Keewaydin School in September, 2000, the District had a school psychologist conduct a functional behavior analysis (hereafter "FBA") of the Student, which analyzed this very issue. The Notice of Educational Assessment/Reassessment form setting up the EBA states that "[t]he context of the behavior and the interventions used to change it will be examined to better understand the purpose of Christopher's challenging behavior and the effect of positive plans."

18. The IHO also stated that the Student was trapped in an increasingly punitive approach to disciplining. which resulted in increasing levels of isolation, time-out and locked seclusion for the Student. However, the record shows that over time the District's responses to the Student's violent behavior actually became less punitive. For example, under the January 9, 2001 IEP, the District actually modified its suspension policies for the Student in an effort to reduce the number of suspensions and to only suspend in the case of physical aggression to adults, students or property.

19. The IHO also stated that no meaningful review of the Student's IEP was undertaken and that the District failed to consistently convene the IEP team and adequately assess the appropriateness of his IEP. However, the record shows that numerous planning and IEP meetings took place during the time period in question. There were team meetings on August 29, August 31, November 7, and November 14, 2000. There were IEP meetings on September 12 and October 10, 2000, and on January 9 and March 2, 2001. At each of these meetings the Student's IEP was reviewed. There is no credible evidence that these reviews were not

meaningful or failed to adequately assess the appropriateness of the IEP.

20. The IRQ also stated that past evaluation results and the success of past behavior management methods and strategies were ignored over the objection of Student's parent. However, the District was under no obligation to follow any management methods and strategies suggested by the parent. The fact that the parent's ideas were not always endorsed by the IEP team does not mean that they were ignored. Furthermore, there is no evidence in the record to suggest that any of these past behavior management methods and strategies resulted in any appreciable success. Sometimes they worked, sometimes they didn't. What is clear is that by the time the Student began his third grade year at Keewaydin School, he was still exhibiting the same behavior problems he previously experienced.

21. There is credible evidence in the record that the Student, while attending Keewaydin and Whittier schools, was provided with instruction specialty designed to meet his unique needs, along with services necessary to permit him to gain educational benefit. At Keewaydin, the Student

was provided with (1) more time to complete assignments, (2) separate space in the class room in which to do his work, (3) positive reinforcement for meeting very minimal requirements, unlike other students, (4) a token economy system for reinforcing behavior, {5) a pro-board to type some of his work instead of writing it out, (6) reduced homework and classroom work assignments, and (7) a longer time period to try to calm himself. In addition, the staff would remain physically near the Student if he needed assistance. Sometimes, the staff would negotiate with the Student the amount of work he needed to complete. At Whittier, the Student was given many of these same services, plus (1) an individualized plan including designing academics in the areas of reading, writing, math, social studies and science along with a special social skills class, (2) allowing the Student to choose cursive or printing for completion of writing assignments, (3) point and behavior sheets sent home at the parent's request, and (4) the ability to choose which staff person he wanted to work with, which was usually not allowed for other students.

22. There is credible evidence in the record that the above services allowed the Student to participate in the

educational programs in each class resulting in a gain of educational benefit.

23. The District consistently proposed personalized instruction for the Student that was reasonably calculated to enable the Student to receive educational benefit.

24. The District developed and implemented an appropriate IEP for the Student's 2000-2001 school year specifically designed to meet the needs of the Student supported by such services as necessary to permit the Student to benefit from the instruction.

25. The District established by a preponderance of the evidence that its actions have been appropriate and that it provided the Student with FAPE; therefore, the District has met its burden of proof as required under Minn. R. 3525.4400.

26. The Student's parent did not provide the District with the opportunity to make modifications to the Student's IEP before unilaterally removing the Student from the District to a private placement at Calvin Academy. Following Student's suspension from Whittier School in January 2001,

the Student's parent demanded homebound instruction. The District provided homebound instruction but the Student's parent cancelled it after only one day and enrolled the Student at Calvin Academy.

27. Reimbursement for private placement is allowed only if two conditions are met: (I) there has been a denial of FAPE, and (2) the party requesting private placement demonstrates that the placement is appropriate. Fort Zumwalt School Dist. v. Clemes, 119 F.3d 607,611 (8th Cir. 1997). Citing Florence County School Dist. Four v. Carter, 510 U.S. 7,13-14,- 114 S.Ct. 361,365-66. 126 L.Ed.2d 284 (1993). "Parents who enroll their child in private school without the approval of the public school district do so with the risk they will not receive reimbursement for their costs." Fort Zumwalt, 119 F 3d at 611-12, citing School Committee of Burlington, Mass. v. Department of Educ., 471 U.S. 359,373-74, 105 S.Ct. 1996.2004-05,85 L.Ed.2d 385 (1985) and Florence County. 510 U.S. at 15, 114 S.Ct. at 366. The parents have the burden of proof on a claim for private placement. Hall v. Shawnee Mission School Dist. (USD No. 512), 856 F.Supp. 1521, 1530 (D. Kan. 1994).

28. As stated above, the District has established by a preponderance of the evidence that it provided the Student with FAPE; therefore reimbursement of the Student's tuition for the private school placement at Calvin Academy is not warranted.

29. Minn. R. 3525.2900, Subp. 1(0) requires school district to provide an extended school year for a pupil when it is determined:

a. That the pupil will experience "significant regression" in the absence of an educational program;

b. The time required to relearn the skills is excessive; or

c. The effects of the breaks in programming are such to prevent the student from attaining the state of self-sufficiency that the student would otherwise reasonably be expected to reach.

The amount and type of service for summer must be appropriate to maintain performance on IEP goals. I4,.

30. The IFO found, and credible evidence supports his findings and conclusions that the Student was not adequately assessed for participation or notified of the possibility of participation in the ESY program for the

summers of 1998, 1999 and 2000. There is credible evidence that the Student's parent incurred personal costs of $1,170.75 in providing educational services to the Student in the summer of 1998 and $2,325.00 in the summer of 2000. There is no credible evidence in the record regarding any personal costs incurred in the summer of 1999.

31. There is credible evidence in the record that the Student was notified of the possibility of participation in the ESY program for the summer of 2001. At the January 9, 2001 IEP meeting, the Student's parent specifically requested ESY for the Student. The March 2, 2001 IEP contemplated reconvening for the purpose of reviewing the need for ESY by the end of May, 2001. Deferring a discussion of the need for ESY until relevant data regarding regression may be collected is a valid approach, consistent with special education laws. Glazier v. Independent School District No. 876, 558 N. W .2d 763, 767-68 (Minn. Ct. App. 1997). ESY for the summer of 200/1 was not finally addressed because the Student was unilaterally removed from the District's educational program.

Based upon the foregoing Findings of Fact and Conclusions, the HRO makes the following:

DECISION

The IHO's Decision is hereby reversed in part and affirmed in part as follows:

1. The District's proposed education program provided FAPE to the Student and could have provided FAPE to the Student if he had remained enrolled in the District's program; therefore, an award of compensatory education is not merited and is reversed.

2. The award of retroactive tuition for Calvin Academy from February 22, 2001 until the end of the 2001 academic year is reversed.

3. The award of tuition reimbursement or payment for ESY at the Calvin Academy for the summer of 2001 is reversed.

4. The prospective award of tuition at the Calvin Academy for the 2001-2002 and 2002-2003 academic years is reversed.

5. The award of reimbursement for personal costs incurred over the summers of 1998 and 2000 in providing educational services to the Student is affirmed as follows: $1,170.75 (Minneapolis Kids, summer 1998), $325.00 (New Visions Boost Up, summer 2000), and $2,000.00 (Child Development Technician, summer 2000).

6. If Student's parent decides to enroll the Student in the District's schools during the 200 1-2002 school year, she shall provide the District with prompt notice. Upon receiving such notice, the District shall arrange for an assessment of the Student and thereafter develop an IEP with appropriate placement prior to the beginning of the school year, assuming notice is received prior to August 1, 2001.

Dated: July 5, 2001

/s/ Gregory L. Wright

Gregory L. Wright
Hearing Review Officer

This Document Contains Not Public Data

MDCFL File No. 409

In the Matter of

Christopher Nygren

v.

Special School District # 1, Minneapolis

FINDINGS OF FACT CONCLUSIONS AND DECISION

The above-captioned matter came on for hearing before independent Hearing Officer, Robert J. Miller (hereafter, Hearing Officer) pursuant to Minn. Stat. Sec. 125.09, subd. 6 commencing at approximately 9:00am on March 13, 2001 and continuing for total of twelve non-consecutive days. Dates included in this due process hearing were March 13 through March 17, 2001; and resuming on April 3, 2001 and continuing through April 7, 2001; April 9, 2001 and April 16, 2001. By mutual agreement, the hearing was held in four locations including: (1) Southwest Area Office, 1006 West Lake Street, Minneapolis, MN; (2) East/Northeast Area Office at 807 Broadway, Minneapolis, MN; (3) Harrison Community Center 507 Irving Ave. North, Minneapolis, MN; and 94) 807 N.E. Broadway, Minneapolis, MN. The hearing was closed to the in accordance with the provisions of Minn. Rule 3525.4200.

Amy Goetz, Center for Education Law, 601 Grand Ave, Suite 200, St. Paul, MN 55102, appeared on behalf of Christopher Nygren (hereafter, "Student") Attorneys James Selmer, Mark Berg, and Nathan Kratin of James C. Selmer and Associates, P.A., 601 Second Avenue South, Suite 3250, Minneapolis, MN 55402, appeared on behalf of Special School District #1, Minneapolis (hereafter "District").

The record in this matter was closed on April 10, 2001. On the record, the parties asked for and were granted three extension to the timeline in this matter totaling 104 days to the 45 day calendar day deadline for issuing a Decision as set forth in Minn. Stat. 125A.091, Subd. 7. The parties agreed upon a simultaneous briefing schedule with an identified final Decision date by the Hearing Officer on or before May 7, 2001.

The following people testified in this matter

1. Kathleen Thompson: Social Worker Keewaydin Elementary School Testimony (Tr 11-212).
2. Dr. Richard Ziegler, Independent Evaluator and Pediatric Neuropsychologist – Testimony (Tr 220-423) and again at (Tr. 471-508)
3. Naomi Siegal, Private Occupational Therapist (Tr 423-470)
4. Dr. Jeffrey Wozniak, Pediatric Neuropsychologist (Tr 516-615)

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5. Rebecca Maloney, Independent Evaluator and Pediatric Occupational Therapist (Tr. 616-666)
6. Lucy Maloney, Occupational Therapist, Keewaydin Elementary School (Tr. 691-759)
7. Omar Othman, Independent Evaluator, Behavior Analyst, and Psychologist, (Tr. 814-928)
8. Dr. Sherrie Lindborg, School Psychologist, Keewaydin (Tr. 928-1002) and again at (Tr. 1032-1108)
1. Jane Groh, Homebound Instructor (Tr. 1004 – 1032)
2. Ann Gunn-Smith, District Monitoring and Compliance Specialist (Tr. 1110 – 1205)
11. Sue Poston, Whittier Elementary Principal (Tr. 1206 – 1293)
12. Linda Azure, School Social Worker, Whittier (Tr. 1294 – 1536)
13. Kristina Ward, Special Education Teacher, Whittier (Tr. 1538-1582) and again at (Tr. 2150 – 2315)
14. Dr. Lawrence Foley, Clinical Psychologists, Washburn Child Guidance Center (Tr. 1592-1675)
15. Thomas Steinmetz, Day Treatment Therapist, Washbourn Child Guidance Center (Tr. 1678-1750)
16. Mary Ellen Thompson, Special Education Teacher, Marcy (Tr. 1753-1775)
17. Gary Berg, Behavior Person (Tr. 1777- 1813)

18. Don Generaux, Principal Keewaydin (Tr. 1822-1884)
19. Dr. Don Allen, Assistant Director of Special Education for the District (Tr. 1892 – 2071)
20. Rob Porte, Child Development technician, Keewaydin (Tr. 2073-2149)
21. Elena Schroeder, Special Education Teacher, Keewaydin (Tr. 2318-2551)
    a. Sharon Nygren, Parent (Tr. 2555-266), again at (Tr. 2894-3215)
    b. Todd Mulvehill, Dean of Students and Behavior Counselor, Calvin Academy (Tr. 2676-2814)
    c. Susan Bigsby – Johnson, Headmaster, Calvin Academy (Tr. 2816-2894)

As provided by Minn. Stat. 125.09, Subd. 9, this decision is binding upon both parties unless appealed by the hearing review officer within 30 calendar days of receipt of this decision. Any Notice of Appeal shall be in writing and shall be filed with the Commissioner of Education with copies sent to all parties.

STATEMENT OF ISSUES

All issues in this matter are in regards to first half of 1998-1999 school year, 1999-2000 school year inclusive of

August, 1999 through February, 2000 (not to include services provided at Marcy Elementary School in March, April, or May of 2000), and 2000 – 2001 (to present) school years; and the Summer of 1998, Summer 1999, and Summer 2000.

The Parent alleges:

1a. The District failed to adequately consider input from Student's Parent in re-evaluations as required by the IDEA, 20 U.S.C. 1414(c).

1b. The District failed to fully inform Student's Parent of all information relevant to assessment and services in order to ensure parental understanding and agreement to assessments and services in order to ensure parental understanding and agreement to assessments and services, and to adequately understand and exercise parental rights to fully participate in the educational planning, to consent or object to Districts proposals, to seek independent evaluations, to provide notice of dissatisfaction and intent to seek private services, or to request a hearing, as required by the IDEA, 20 U.S.C. 1414(c (3), 1415 (a), (b), and (c).

1c. The District failed to ensure that, in developing Student's IEP's, the IEP team considered his Parents' concerns or evaluation results, as required by the IDEA, 20 U.S.C. 1414(d)(3)(A).

1d. The District failed to ensure that the Student's Parent fully participated in meetings regarding the identification, evaluation, educational placement and provisions of a free and appropriate public education as required by the IDEA, 20 U.S.C. 1415(b)(2).

1e. The District failed to ensure that Student's Parent received written prior notice and the Parent's consent whenever it proposed or refused to change and evaluation, placement or the provision of a free and appropriate public education as required by the IDEA, 20 U.S.C. 1415(b)(3).

1f. The District failed to ensure that Student's Parent was fully informed of her right to give, withhold and withdraw consent to a behavior interventions plan at any time as required by Minn. R. 3525.2900, subp. 5(E).

2. The District failed to adequately evaluate Student's needs for special education and related services as required by the IDEA, 20 U.S.C. 1412(a)(3) and (7), and 1414(a)(2), (b) and (c).

3. The District failed to provide the Student with an Individualized Education Program designed to meet his unique educational needs and thereby failed to confer meaningful educational benefit to the Student or to

provide him with a free and appropriate public education as required by the IDEA and Minnesota state law.

Specifically,

3a. The District failed to ensure that Student's IEP team developed, reviewed, and revised his educational programs to meet his needs as required by the IDEA, 20 U.S.C. 1412(a)(4), 1414(d)(1)(A), and 1414 (d)(4).

3b. The District failed to consistently measure and report Student's progress on his IEP's as required by the IDEA, 20 U.S.C. 1414(d)(1)(A).

3c. The District failed to ensure that, in developing Student's IEP's, the IEP team considered appropriate strategies, including positive behavioral interventions, strategies, and supports to address his impeding behaviors, as required by the IDEA, 20 U.S.C. 1414(b)(3)(B).

3d. The District failed to develop behavioral interventions so that the Student could acquire appropriate behaviors and skills to enable him to function as independently as possible, as required by Minn.R. 3525.0850.

3e. The District failed to provide an atmosphere that was conducive to learning and that met Student's special physical, sensory and emotional needs, as required by Minn. R. 3525.1400.

3f. The District failed to provide a functional analysis of Student's behavior when considering the use of a conditional intervention procedure, as required by Minn. R. 2750.

3g. The District failed to ensure that the planned and predictable use of conditional procedures with Student was included in his IEP, as required by Minn. R. 3525.2900, subp.5 (A)(1).

3h. The District failed to ensure that the continued and repeated use of elements of its discipline policy with Student was reviewed in the development of his IEP's as required by Minn.R. 3525.2900, subp.5 (B).

3i. The District failed to consistently convene Student's IEP team and adequately assess the appropriateness of his IEP, the need for additional assessment, or amendments to his IEP when conditional procedures were used in emergency situations twice in a month or when his pattern of behavior emerged that interfered

with his educational success, as required by Minn. R. 3525.2900, subp. 5 (C).

3j. As a result, Student has not received services sufficient to confer meaningful benefit and provide him with a free appropriate public education as required by the IDEA, U.S.C. 1412(a)(1). In addition, the District has denied Student a free appropriate public education in the lease restrictive environment in violation of corollary state law and its implementing rules. Minn. R. 3525

4. The District failed to consider, utilize, coordinate with, or implement the services and recommendations of various public agencies and service providers as required by the IDEA. Specifically,

4a. The District failed to adequately consider and implement the recommendations of various service providers and evaluators despite parental request, and failed to adequately describe the basis for its refusal as required by the IDEA, 20 U.S.C. 1414(c)(1).

4b. The District failed to determine and identify the interagency coordination responsibilities of various public agencies and failed to promote the coordination and timely and appropriate delivery of services

necessary to ensure an appropriate education for the Student, as required by the IDEA, 20 U.S.C. 1412(a)(12), and by state law, Minn. Stat. 125A.10.

Based upon the evidence, testimony, and briefs submitted in this matter, the independent Hearing Officer makes the following:

FINDINGS OF FACT

1. Christopher Nygren (hereafter, Student) is a nine year old male. His history is significant for a lesion in the right basal ganglia, mild frontal lobe atrophy, and a longstanding history of severe behavioral and emotional dysregulation including physical aggression, depression, and sensory sensitivities. (D.E. 42) Student has a history of his behavior escalading to the point where he does something threatening or violent (Tr. 258)

2. From the winter of 1993 to the winter of 1995, Student experienced chronic upper respiratory infections and consistent high fevers above 101 degrees Fahrenheit. Sometime during the 1994-1995 winter season, Student reportedly experienced 4 febrile seizures (i.e. seizures resulting from high fever). The behavioral manifestation of these seizures included convulsions

and cessation of breathing lasting for approximately 3 minutes.

3. On May 1, 1998 the Student was evaluated by Dr. Lawrence Burstein, Pediatric Neurologist for behavioral difficulties. The Pediatric Neurologist noted that the Student had problems with is behavior over the past several years. In the classroom there had been problems of the Student kicking chairs, and being physically aggressive with different objects as well as crawling under a table and throwing things. The Pediatric Neurologist noted that the Student was doing quite well in school. At this time, the Pediatric Neurologist noted that the Student had a history of febrile seizures from which he was now doing well. The Pediatric Neurologist did not feel that the seizures has played any role in the Student's behavior. (D.E.8) This diagnosis was made without the benefit of the Magnetic Resonance Imaging (MRI) testing. (Tr. 270)

4. The Student has a long-standing history of psychiatric difficulties and has received previous diagnoses of Bipolar Affective Disorder, Oppositional _ Defiant Disorder (ODD), Attention Deficit Hyperactivity Disorder (ADHD), and Major Depressive Disorder (MDD). Psychiatric history also includes significant

physical aggression, suicidal ideation separation anxiety and recent onset sleep disturbance (H.T. 42)

5. Around 1999-2000, Student began to experience headaches, primarily in the frontal region bilaterally. In February of 2000, student underwent a Magnetic Resonance Imaging (MRI) of the brain at Fairview University Medical Center (FUMC). Results indicated "small cystic areas in the head of the right caudate nucleus...probably secondary to encephalomalacia. The cortical sulci and ventricles are slightly prominent. The sulci are most prominent over the frontal regions." Overall impressions were "...mild atrophy most prominent in frontal regions" and a "cystic area in the right caudate nucleus most compatible with an old mall lacunar infarct (stroke) involving the right caudate nucleus." A sleep – deprived electroencephalographic (EEG) examination was also conducted at FUMC, in February of 2000. Results of the EEG were "...within normal limits for an 8 year old in the awake and Sleep State." In August of 2000, Student underwent a repeat MRI. Findings indicated "a small area of cystic enciephalomalica in the right frontal lobe in the deep white matter area adjacent to the frontal horn of the right ventricle. Several small cystic cavities suggestive of mild bifrontal volume loss. The gray and white matter structures were otherwise within normal limits."

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Collectively, results indicted lesions in the basal ganglia and mild frontal atrophy of unknown etiology. However, it was thought that Student's MRI findings might have been due to possible stroke, infection, or demyelianation. (D.E. 42) The Student has previously been prescribed Neurontin, Zoloft, Paxil, and Lithium for behavioral regulation. His current medication regiment includes Depakote for headaches and Effexor for mood regulation. (D.E. 42)

6. At all relevant times the Student has resided within the District's boundaries. (Tr. 3068-3069)

7. Sharon Nygren (here after, Parent) is an educated person with two bachelors degrees, a master's degree and a "mini MBA" in non-profit management (Tr. 2555, 3056-3058) Parent has worked with mentally ill adults, manages a home for young adults with emotional / behavior disorders, worked as an educational assistant in Parkview Montessori School. (Tr. 2556-2562)
8. Parent testified that she initiated contact with Washburn Child Guidance Center for held with the Student's behavior in pre-school (Tr. 2569)

9. Student became a Student of the District in February 1998. At that time he was enrolled in Park View Elementary School (P.E.A – 11)

10. Parent testified that she requested special education evaluation for Student in kindergarten. (Tr. 2583) Student was placed into special education in his kindergarten year. Assessment Team Summary Report noted dated May 12, 1998 state: "Student has a history of explosive violent behavior at home, at Washburn Child Guidance Center and at Harvest Prep (Day care Center) prior to coming to Park View in February."(1998). The Assessment Team Summary Report identified the Student's disability as emotional / behavioral disorder (EBD). (P.E.A. –11)
11. An IEP was developed for the Student at Park View Montessori based on a team meeting held on June 2, 1998. The Parent testified that no discussion took place regarding extended schools year services and no one told the witness about those services. (Tr. 2591, P.E. C-15) The June 2, 1998 IEP for the Student states "NO" in the box on the form where ESY services are indicated as needed or not needed. The Parent participated in the IEP meeting. (P.E. C-15)

12. Parent further testified that she provided privately funded summer services for the Student a Minneapolis

Kids for a total cost of $1,170.75 (Tr. 2592-2596, P.E.I – 1)

13. Parent testified that Gary Berg designed and implemented a successful medallion behavior intervention program for the Student in his kindergarten year at Park View School. (Tr. 2578-2580)

14. Gary Berg, (hereafter, Behavior Person) worked with the Student in kindergarten though February 2000 (second grade) while he was at Parkview Montesoori school. (Tr. 1779) Mr. Berg was involved with the Student initially before he was found eligible for special education. (Tr. 1795) At the time, Mr. Berg was doing regular education pre-referral interventions/ (Tr. 1795) When the Student was identified as having special education needs, a different behavior person took over. However, Mr. Berg remained involved with the Student as a member of the IEP team. (Tr. 1796)

15. At an undetermined date, Mr. Berg resumed his duties as the primary person assisting the Student with behavior management at Park View. (Tr. 1796)

16. In first grade, the Student began the year in the classroom of first grade teacher # 1 (A.S.). Mr. Berg testified that in first grade, the Student's behavior

deteriorated and the Student spent a lot of time in time-outs and time-outs were not successful. (Tr. 1798)

17. Later in the year, he was transferred to the classroom of first grade teacher # 2 (O.S.) Mr. Berg testified this transfer occurred approximately the time of winter break and that the Student's behavior improved the second half of the year. (Tr. 1798-1799) The successful behavior program by Mr. Berg focused on replacement behaviors and role-play. The Student would remove himself from teacher # 2, (O.S.) classroom. There was dramatic improvement in behavior and he was doing well by the end of the year.

18. An IEP meeting was held regarding the Student on February 18, 1999 while the Student was attending Park View Montessori School. Under section J "Extended School Year": Are extended summer school year services required for the student?" The box is checked "NO". The Parent participated in the IEP meeting (P.E.C. –15)

19. A new IEP was developed during the Student's first grade year. The IEP meeting was held of February 18, 1999 and the IEPO was written on February 24, 1999. (Tr. 2602m P.E.C. –14) This IEP included the

Behavioral Intervention Plan that was developed for the Student in kindergarten by Mr. Berg. (Tr. 2605)

20. Parent also testified that the Student received educational benefit from the progress he made in the second half of the first-grade year. (Tr. 2601)

21. Parent testified that there was no discussion at any IEP team meeting over the Student's first grade year regarding his need for ESY services (Tr. 2610)

22. Mr. Berg testified that he did not remember a discussion of eligibility or need for Extended School Year (ESY) services at any of the IEP team meetings that he attended. (Tr. 1809) Mr. Berg attended the February, 1999 first grade IEP meeting. (P.E.C.-14) Mr. Berg also attended the February 28, 2000 IEP meeting (P.E.C. – 13)

23. Parent testified that she paid for the Student to attend Minneapolis Kids Center for educational services over the summer of 1999. (Tr. 2620 – 2615)

24. Parent testified that Sue High of Washburn Child Guidance Center recommended the Parent to a program call Success in Motion (Occupational Therapy, OT) over the summer of 1999 for an OT evaluation. This

OT service was operated by Naomi Siegal. (Tr. 2615, 2517)

25. Student was referred for OT evaluation by Sue High, therapist at Washburn Child Guidance Center due to behaviors impacting the Student's ability to function appropriately during many daily activities. Student demonstrated many signs of sensory defensiveness and his behavior and hyperactivity escalated with many types of sensory input. Student was evaluated by Naomi Seigal, Occupational Therapist (hereafter, Private O.T.) on August 8 and September 2, 1999.

26. The findings of the OT evaluation by the Private OT suggested: Student showed many examples of tactile sensitivities including irritated by labels on clothing, complaints if his shocks and clothes are not on correctly, dislikes certain textures. He is averse to grooming activities such as hair washing, hair cutting, and nail cutting. He is often overly active, sometime engages in self-injurious behavior. He reacts defensively to orders. He is easily distracted by visual stimulation and often blinks at bright lights or seems irritated by them. He has difficulty making eye contact. He is easily distracted by odors and by sounds. Student demonstrated a moderate to high degree of sensory defensiveness in his reactions to touch, sound, smell,

and visual stimuli. Student has developed a repertoire of behaviors that have allowed him to minimize or avoid the activities that challenge his difficulties. (D.E. 95)

27. Recommendations of the OT evaluation included:
(a) OT therapy 2 X per week to decrease sensory defensiveness. Possible goals included: (1) improved behavior (i.e. wearing clothing without removing tags, (2) tolerating grooming activities, (3) increase time spent in seat activities,
(b Improved fine motor skills. Possible goals included: (1) improved ability and willingness to engage in writing and school work without frustration or aggression, (2) using appropriate bilateral coordination and midline crossing movement.
(c) Improved gross motor skills. (1) Improved balance activity, (2) postural flexion and extension movement during play. (D.E. 95)

28. The Private OT saw the Student 32 times from December 1999 though June 2000. (Tr. 440) In addition, the Student was re-evaluated by the Private OT in September / October, 2000. (Tr. 445) In this Re-evaluation Report of October 2000 the Private OT provides some "calming activities" based on her findings. The Private OT suggested: (a) "heavy work"

activities that use the large muscled of the body. These activities would "calm" the Student and must be programmed throughout the day. (b) Heavy work such as carrying heavy objects for the teacher, moving furniture, doing push-ups, chair push-ups or isometrics, (c) oral activities such as sucking thick substances through a straw or chewing gum. The Private OT suggested these claming activities "must be used on a regular basis prior to his being 'out of control' as they are not going to stop a reaction or outburst once he is over stimulated." The calming techniques are used to prevent behavior from escalating. (Tr. 467-468, D.E. 64) The Parent implemented the use of calming techniques in the home. (Tr. 469-470)

29. The Private OT developed a list of "calming activities" and attended three team meeting regarding the Student. One meeting was an IEP meeting at Washburn Child Guidance Center, one meeting was a discharge meeting at a hospital and one meeting was in IEP meeting at Marcy Elementary School. Mother invited the Private OT to each meeting. The Private OT was not asked by teachers or anyone else to give input or recommendations at these meetings. (Tr. 441-443) In the opinion of the Private OT, the District did not address the Student's sensory deficits at any pf these meetings. (Tr. 443-444) The Private OT prepared a list of "calming activities for the Student (P.E.B – 7p 3 and

4) but she is unsure as to whether these activities were provided the school. (Tr. 455-456)

30. The Bill for the Private OT's initial evaluation (8.26.99 & 9.2.99) and for 27 appointments while school was in session was a total of $3,375 for those dates Private OT was paid a total of $ 2,616.16 by Blue Cross / Blue Shield for these sessions and evaluation total. A total bill of 4758.84 remained unpaid by insurance. (P.E. I – 3)

31. Parent testified that she privately obtained this OT evaluation and private OT services at her own expense. (Tr. 2617-2618)

32. During second grade, the Parent testified that she sought outside assistance for help with the increasing behavior problems of the Student. Parent sought home-based mental health services for the Student and family through Washburn Child Guidance Center. This expense was paid for by insurance. (Tr. 2627-2628)

33. Mr. Berg continued to work with the Student during his second grade year at Park View. During the second grade year, the Student's behavior began to deteriorate to the point that he was hospitalized during the year. (Tr. 1800) It became clear during the second grade year that the Student was far more needy than a regular

education classroom teacher with 22 to 24 other students could provide. (Tr. 1801) Witness testified that the IEP was followed as much as possible in the regular education classroom given the Student's deteriorating behavior in the fall of second grade (Tr. 1802)

34. In the fall of the Student's second grade year, Mr. Berg testified the Student's treating psychiatrist recommended withdrawing the Student from school in order to stabilize his condition. (Tr. 1803) Parent also testified that, in the fall of 1999, Students behavior at home and in the community deteriorated and his treating psychiatrist recommending withdrawing the Student from school temporarily to address his psychiatric needs. (Tr. 2637)

35. Parent testified that in late October, 1999 the Student verbalized suicidal threats. (Tr. 2647) He began seeing Dr. Romero, psychiatrist, in the seconds week of November, 1999. About a week later, Dr. Romero suggested that the Parent remove the Student from school so that medication could be more aggressively introduced. (Tr. 2647) After winter break, the Student was hospitalized for nine days and then transferred to Fairview Riverside's Day Treatment Program (Tr. 2648) The Student was in the Fairview Riverside Day Treatment Program for three weeks. (Tr. 2650)

36. In January 2000, student was admitted to the FUMC Children's Mental Health Unit due to aggressive behavior toward his mother. (D.E. 145)

37. There was an IEP meeting regarding the Student the day the Student was discharged from Fairview Day Treatment Program. (Tr. 2650)

38. Parent testified that Mr. Berg suggested to the Parent that the Student go to a Special Elementary Needs (SPEN) special education classroom upon return to the District form Fairview Day Treatment. Parent had never seen or hear of SPEN so School Social Worker suggested that Parent go and visit several programs. School Social Worker, Lillanne Belezikian made appointments for the Parent. (Tr. 2650-2651)

39. Over the next week the Parent visited different SPEN programs with the School Social Worker. (Tr. 2651)

40. Parent testified the Student began March SPEN program a week or two after his release from day treatment. It was March, 2000. (Tr. 2652)

41. Mary Ellen Thompson, (hereafter, Special Education Teacher, Marcy) was the Student's EBD special

education teacher from March, April and May 2000 at Marcy Open School. (Tr. 1755-1756) The witness was also the Student's special education teacher for the first few weeks of September at Keewaydin School. (T. 1757)

42. Special Education Teacher, Marcy described the Student as a beautiful child, very intelligent, very sensitive, very severe needs with lots of sensory issues, and some neurological processing issues. (Tr. 1760) Student was in the classroom of the Special Education Teacher, Marcy during March, April, and May of 2000. In May 2000 he was hospitalized for three weeks and was discharges in June 2000. (Tr. 2896)

43. Parent testified that she inquired into the availability of summer programming for Student with the District upon his discharge in June 2000 but was not informed about the availability of special education services. (Tr. 2897-2898)

44. Parent testified that a hospital social worker referred her to the Hennepin County Children's Mental Health Collaborative and she initiated an application for assistance in spring of 2000. (Tr. 2652-2653)

45. The Parent did not yet know where the Student would be attending school in the fall and made numerous contacts to District staff to try to determine his placement. (Tr. 2900-2904)

46. Parent testified that she provided summer services to the Student over the summer of 2000 at her own expense including enrollment at Washburn Child Guidance Center half-day treatment program, New Visions Boost Up program and private OT services. (Tr. 294-2913) Also during the summer of 2000 the Parent privately hired a one-to-one aide for the Student to act as respite care. Joseph Brown was hired by the Parent because he was the CDT in the Marcy program in which the Student had participated and had a good working relationship with the Student. (Tr. 2909) The cost of these services was not paid by insurance and the Parent made the total payment of $2,000 for this service. (Tr, 2908-2909, P.E.I-4) The Parent also incurred the cost of payment for the New Visions Boost Up program and paid $ 325. (Tr. 2910-2911, P.E. 13)

47. Parent testified that the summer, 2000 program was a success and that the behavior plan utilized by Mr. Brown was almost a mirror of the program implemented by Mary Ellen Thompson in the Marcy SPEN program. (Tr. 2912)

48. Parent testified that Special Education Teacher, Marcy did a great job and the Student was successful in March, April, May, 2000 in the Marcy SPEN Program (Tr. 2654) Student participated in a regular education reading class while at Marcy. (Tr. 2654)

49. Special Education Teacher, Marcy spoke to the Day Treatment therapist from Washburn Child Guidance Center 'two, three times a month or more" regarding the Student while the Student was in the Mercy SPEN program. (Tr. 1770)

50. In the fall, 2000 the Marcy School program was moved to Keewaydin School. The Special Education Teacher, Marcy testified that the physical facilities at Marcy were not sufficient and the program was moved. (Tr. 1757)

51. Special Education Teacher, Marcy testified that decision to move the Student from the classroom of Special Education Teacher, Marcy to the classroom of Elena Schroeder was made for several reasons. First, the student's in the classroom of Special education Teacher, Marcy were lower functioning academically and the Student was a better academic fit in Ms. Schroeder's classroom. Second, the team believed

Student was ready for more responsibility and more structure. (Tr. 1774)

52. In a medical and psychiatric history in an evaluation completed in 2000, the Parent reported that behavior problems (e.g. throwing, kicking, biting) began in preschool which led to an evaluation and treatment by Dr. Lawrence Foley at Washburn Child Guidance Center. Dr. Foley diagnosed Student with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Student was seen in outpatient treatment until 1998 when he entered a day treatment program though Washburn. (D.E. 145)

A. An IEP meeting was held regarding the Student on February 28, 2000 while the Student was attending Marcy Open School. Under section J "Extended School Year" : Are extended summer school year services required for the student?" The box is checked "NO" and a team member wrote: "Summer school is provided as an option". Parent participated in the IEP meeting. (P.E.C – 13)

B. Parent called Keewaydin Social Worker before school started in order to set up meeting regarding the Student. This first educational conference at Keewaydin occurred on August

29, 2000. (D.E. 42) The purpose of the meeting was to determine the educational placement for the Student. (D.E. 42) No written notice was provided the Parent prior to this meeting. (Tr. 122) At that meeting, Parent agreed to a functional behavioral assessment (FBA) an occupational therapy assessment of the Student. (T. 20, Tr. 46, D.E.42) A Notice of Educational Assessment / Reassessment was completed and signed by the Parent at the August 29, 2000 team meeting (D.E. 40) and District provides notice to Parental educational rights along with the notice of educational assessment. (Tr. 47-51)

C. Parent gave the Keewaydin Social Worker a list of outside people she would like to have participated in the meeting. S W and Parent contacted those people and invited them to attend. (Tr. 22) Persons attending the August 29, 2000 meeting included Parent; Bobbie Evans, Executive Director of the Mental Health Collaborative; and Naomi Seigal, Occupational Therapist (OT); Sue Martin, special education teacher; Kathy Thompson, Keewaydin Social Worker; Sherrie Lindborg, Keewaydin School Psychologist; LeeAnna Handon, Special

Education Assistant Facilitator; Jennie Kenertz, Day Treatment Social Worker; Roberta Woods, Special Education Assistant Facilitator; Mary Ellen Thompson, Special Program for Elementary Needs (SPEN) teacher; Lucy Maloney, Occupational Therapist; and Art Lakoduk, Acting Principal. (Tr. 33, D.E. 42)

D. At the August 29, 2000 meeting the Parent gave much information about the Student (Tr. 36,38,39) including: (a) that the Student was very anxious, fearful, and aggressive, (b) the Student had anxiety problems, (c) the Student had sensory integration issues, (d) an MRI had revealed an injury to the frontal lobe of the brain, (e) behaviors had had numerous medications and many diagnosis.(Tr. 134-135, D.E. 42) The notes from the meeting reflected the Parent's concerns. (Tr. 40)

57. At the August 29, 2000 meeting, it was noted that the Student hadlots of anger and needs restraint for safety issues but that the use of restraint was not effective. (Tr. 137, D.E. 42)

58. At this meeting the Parent stated she did not want the Student to attend Crawford school and agreed to

placement of the Student at Keewaydin with a one-to-one educational assistant. (Tr. 42) The educational team had concerns about the Student attendance including the Student's need for a one-to-one educational assistant (EA). LeeAnna Hanson, Special Education Assistant Facilitator agreed to provide Student with a one-to-one EA for the first two weeks of school to help with the transition (tr. 146-146, D.E. 42)

59. On August 31, 2000 an educational planning meeting was held to pan for the first two weeks of school at Keewaydin. (Tr. 62) This meeting was attended by Parent, Bobbie Evans of the Mental Health Collaborative; Art Lakeduk, Acting Principal, Mary Ellen Thompson, Special Education Teacher, Joe Brown, Child Development Technician (CDT), the Keewaydin School Psychologist, Sherrie Lindboug and Kathy Thompson, Keewaydin Social Worker. (D.E. 43) Parent requested curriculum information and a daily schedule for the Student. In addition, the parent provided information on managing the Student's behavior including calming techniques and redirecting strategies. (Tr. 62, D.E. 43) Parent also stated she would sent information to the special education regarding sensory integration strategies. (D.E. 43) Consequences for physical violence by the Student were discussed at the meetng including (a) debrief with

principal, (b) call mother before suspension and (c) consequences at home (D.E, 43) Parent requested the inclusion of Pat Anderson, PACER advocate, to attend the IEO meeting scheduled to be held at Washburn Child Guidance on September 12, 2000. (D.E. 43)

60. At the August 31, 2000 meeting the team developed a plan for the first two weeks of school. (D.E. 43) The Parent provided suggestions to be used during Student "meltdowns" including: (a) Give clear expectations, (b) rewards / consequences, (c) pick a safe spot in room, (d) time out in room, (e) use calming techniques such as playing with legos, pull-bend toys, (f) debrief after regaining composure, (g) if cant be controlled – call mother. (Tr. 164, D.E. 43)

61. There was no discussion at the August 29, 2000 or the August 31, 2000 team meeting about extended school year (ESY) services. (Tr. 170)

62. Keewaydin Social Worker believed the Parent was able to convene her wishes and that they were considered at the August 31, 2001 team-planning meeting. (Tr. 65)

63. On September 5, 2000 the Parent was provided notice of a team meeting to be held on September 12, 2000 at Washburn Child Guidance Center. The purpose of the

meeting was to review the Student's IEP. (D.E. 47) The notice of Teach Meeting was prepared by the Keewaydin Social Worker. (Tr. 67)

64. Persons attending the September 12, 2000 IEP meeting included Naomi Siegal, Private OT; Art Lakouduk, Acting Principal; Parent; Elena Schroeder, SPEN special Education teacher, Keewaydin; Donna Hooper, 3rd general education teacher, Sherrie Lindborg, School Psychologist from Keewaydin; Pat Anderson, PACER advocate; Kathy Thompston, Keewaydin Social Worker, Tom Steinmetz, Washburn Child Guidance Therapist; Bobbie Evans, Mental Health Collaborative Coordinator; and Mary Ellen Thompson, SPEN Teacher. (D.E. 51) Parent requested the IEP meeting be held at Washburn Guidance Center and that outside agencies be included. (Tr. 72, D.E. 50) At the meeting parent agreed to allow the existing IEP to remain in place until the evaluation results meeting scheduled for October 10, 2000. (Tr. 72, D.E. 50)

65. At the September 12, 2000 IEP meeting it was decided with Parent approval to move the Student from Mary Ellen Thompson's SPEN room to Elena Schroeder's SPEN room. Because the Student had higher academic functioning, it was felt that he would do better in Elena Schroeder's classroom. The team developed a plant for

transition form one room to the other (Tr. 73-74, D.E. 50) Elena Schroeder explained her classroom at the meeting. (Tr. 2325) Ms. Schroeder, (hereafter, Special Education Teacher, Keewaydin) explained that Student would be her sixth student in the class and that the program had three adults to help with academic and behavioral curriculum. The Classroom was explained as a "very highly – structured system, a token economy system. The Program also used sticker charts for good standing, social skills and academic behavior. (Tr. 2325) Student moved to Special Education Teacher, Keewaydin classroom on September 16, 2000. (tr. 2327)

66. Elena Schroeder, (hereafter, Special Education Teacher, Keewaydin) is a teacher of students with emotional behavior disorders (EBD) assigned to a special program for elementary needs classroom (SPEN) She has bee an EBD teacher for 18 years. (Tr. 2318-2319)

67. At Keewaydin school, the Student attended half days 4 days a week and one full day during the week (tr. 2327) Curriculum-based measurements by the Special Education Teacher, Keewaydin suggest that in the area of academics, regarding fluency is the Student's strength and written expression his area of weakness. (Tr. 2366, D.E. 88)

68. Special Education Teacher, Keewaydin describes the "Stop and Think" strategy as a claiming time for one minute and a timer is used. (Tr. 2339) If after one minute, the Student is not under control, then they are asked to take a time-out, which is in the back of the room. (Tr. 2339) If there is aggressive behavior by a student, they typically go right to time-out. (Tr. 2341)

69. On September 26, 2000 the Parent was provided a Notice of Team Meeting for an IEP meeting to be held on October 10, 2000. The purpose of the meeting was to discuss evaluation results, to review the Students IEP, consider extended school year (ESY) services and to revise the Student's IEP as needed. Persons invited to the IEP and reevaluation meeting included: Parent; Acting Principal; SPEN teacher, Elana Schroeder; General Education teacher; Keewaydin OT; Keewaydin School Psychologist; Private OT; Mental Health Collaborative Coordinator; PACER advocate; and Washburn Child Guidance therapist. (Tr. 78, D.E. 58)

70. Standard practice is for Procedural safeguards to be provided with the Notion of Team Meeting (Tr. 79-80, D.E. 58) The Keewaydin School Social Worker believed the Parent was aware of her parental rights

because of this list of people that she wanted to invite to the IEP meeting. (Tr. 159)

71. On October 10, 2000 a team meeting was held to discuss assessment results and the Student's IEP. Persons attending the meeting included: Parent, Keewaydin SPEN teacher Schroeder; Washburn Child Guidance therapist, Keewaydin Social Worker, Keewaydin School Psychologist, and the Mental Health Collaborative Coordinator. (D.E. 68) At the meeting assessment results were discussed by School Psychologist regarding the Functional Behavior Assessment (FBA) (Tr. 178) as well as by the Occupational therapist regarding the OT assessment. (D.E. 68) There was no discussion regarding goals and objectives at this meeting. (Tr. 178) Elena Schroeder, Special Education Teacher, Keewaydin testified that behavioral data sheet that she collected (D.E. 89, D and G) were attached to the IEP to reflect presented level of performance. (Tr. 2485-2486)

72. During the October 10, 2000 team meeting, Keewaydin SPEN teacher noted that the Student "does not take STOP and THINK – GOES RIGHT TO TIME-OUT. (Tr. 85, D.E. 68) Keewaydin SPEN teacher notes that Student is in "constraints 6x grater" and is "aggressive 10 x greater". (D.E. 68) A decision

was made to meet before Thanksgiving break to reassess behaviors and physical aggression in the classroom. (Tr. 85, D.E. 68) The Conference Summary Report indicates that the Student has "never gone to time-out without losing it." (D.E. 68)

73. As a result of the team meeting of October 10, 2000, an IEP was developed for the Student. Interagency Services listed on the IEP included Washburn Child Guidance Center, Success in Motion, Occupational Therapy Services, and Hennepin Co. Mental Health Collaborative. (Tr. 91, D.N 69) There is no identification of the specific services offered the funding of those services or the responsibilities of the interagency services listed in section M of the October 10, 2000 IEP. (Tr. 193, D.E. 69) The Washburn Child Guidance therapist and Hennepin Co, Mental Health Collaborative Coordinator were in attendance at the October 10, 2000 IEP meeting (D.E. 68, 69)

74. ESY was not offered in the October 10, 2000 IEP. ESY was not discussed at the October 10, 2000 IEP meeting. (Tr. 190) Keewaydin Social Worker stated in was "premature" to try to decide issues regarding ESY because the team did not have data to know if the Student needed it or not. Social Worker testified that this would probably be talked about in the spring. (Tr.

191, D. E. 69) In the process IEP (D.E. 69), sections "J" regarding ESY services was checked "no". Elana Schroeder, Special Education Teacher, Keewaydin testified that the team did not know the Student well enough to ascertain whether he needed ESY services. (Tr. 2347-2348) Special Education Teacher, Keewaydin testified that the Student needs to be in the program for at least six weeks before a decision regarding EDY is possible. (Tr. 2348)

75. In preparation for the October 10, 2000 IEP meeting, Special Education Teacher, Keewaydin prepared a Conditional Behavioral Intervention Plan as part of the IEP. (Tr. 2351, D.E. 69) The Parent did not agree to the BIP. (D.E. 69)
76. On October 23, 2000 the Keewaydin School Social Worker sent a Notice of Team Meeting to the Parent for a planning meeting scheduled for November 14, 2000. (D.E. 77)

77. On October 25, 2000 the Keewaydin School Social Worker sent a Notice of Team Meeting to the Parent for a planning meeting with School Staff. The meeting was scheduled for November 7, 2000. (D.E. 81)

78. Keewaydin program does not have therapeutic support component or locked and secluded timeout room.

79. On November 7, 2000, a planning meetings was held with school only in order to provide the staff an opportunity to get together to "be on the same page" in the upcoming November 14, 2000 meeting with the Parent. (Tr. 194) At that meeting District staff decided to suggest a new plan for addressing the behavior of the Student. This new proposed plant included the following components. First, if the Student needed restraint for 15 minutes or more then Parent would be called to come and get him. Second needed restraint for 15 minutes or more then Parent would be called to come and get him. Second, if Parent could not be reached and the Student was still out of control, then the police would be called. (Tr. 194, D.E. 82)

80. On November 14, 2000 the educational planning team met in a meeting called a "behavior update" At this meeting the District's plan to call the police was discussed with the Parent. The Parent expressed her objection to calling the police. (Tr. 195 - 196) Parent also suggesting that it was not a good idea to call the Parent since this might be counterproductive. (D.E. 82)

81. Elana Schroeder , the Special Education Teacher at Keewaydin, testified that at the November 14, 2000 team meeting, Tom Steinmetz the Washburn Child

Guidance Center Therapist reported to the team the use of restraint escalated the Student's behavior. (Tr. 2452)

82. In the November 14, 2000 meeting summary, it was noted that the Parent believed the Student needed practice on the "Stop and Think" strategy. (D.E. 82) Special Education Teacher, Keewaydin testified that the Student was taught the "Stop and Think" procedures. (Tr. 2358)

83. Parent counsel stipulated that the Parent received on a variety of occasions during the course of events that are at issue, procedural safeguard notices. (Tr. 206-207)

84. Dr. Richard Ziegler, Assistant Professor of Pediatrics and Neurology and a Pediatric Neurologist at the University of Minnesota Medical School (hereafter Independent Evaluator One), conducted a comprehensive neuropsychological evaluation of the Student at the direction of the Hearing Office. (Tr. 228-229, P.E.K –15))

85. During the neuropsychological evaluation of the Student at Fairview University Medical Center, the Student displayed threatening behavior to a member of the evaluation team on more than one occasion. (Tr.

249-252, D. E. 42 p. 8-9) In general, the Student was easily engaged and rapport was easily established and maintained. (Tr. 256, D.E. 42 p. 9)

86. During the time of the neuropsychological evaluations at Fairview University Medical Center, the Student's behavior and emotion status deteriorated significantly to the point where it became necessary to summit an interim report with treatment / placement recommendations. (D.E. 42)
87. According to Independent Evaluator One, a review of Student's records indicated that behavioral goals were developed student and behavior charts were utilized promote appropriate behavior. These plans were all met with very limited success however. The Independent Evaluator One found in reviewing the academic records that the usage of time-out room appeared to e the most commonly used method to manage Student's inappropriate behavior. (D.E. 42)

88. At the time of the suspension from Whittier Elementary School and according to the Individual Education Plan (IEP) dated 10/10/00, the Student behavioral goals were listed as: (a) Student will continue to improve his ability to maintain self-control and act appropriately in the school setting, (b) Student will improve his ability to complete work, comply

with requests, follow directions and participate appropriately in class activities, (c) Student will work toward independently solving problems in a manner suing common sense and anger management techniques, (d) Student will develop skills to build and maintain friendships and to recognize his own self worth. (D.E. 42)

89. Results of the neuropsychological evaluation performed by Independent Evaluator One indicated that the Student's overall intellectual functioning fell within the average range: Verbal IQ –Standard Score (SS) 93, Performance IQ – SS 115, Full Scale IQ – SS 104. (D.E. 42) Academic testing scores were within the average range. The Weschler Individual Achievement Test (WIAT) indicated basic reading score (SS –91) and mathematics reasoning score (SS-100) within the average range. The Clinical Evaluation of Language Fundamentals (CELF – III) scores indicated Student performance within the average range. (D.E. 42)

90. Test results of the Purdue Pegboard to measure fine motor speed and coordination indicated the Student's performance was generally impaired in the use of speed and coordination with his left hand and in the use of both hands simultaneously. In addition the

Student was below average in fine motor speed with his dominant hand. Overall, the results were significant for dysfunction associated with right frontal lobe findings. (D.E. 42 p. 18)

91. Test results from the neuropsychological evaluation indicate the Student is experiencing clinical levels of depression and continues to report suicidal ideation. Student has significant difficulty with impulsively and his ability to sustain attention is task dependent. (D.E. 42)

92. The frontal lobe is associated with self-regulation skills. Behavioral and emotional regulation and the capacity to inhibit behavior. According to the Independent Evaluator One, it is not uncommon for children with frontal lobe dysfunction to experience significant behavioral regulation including physical aggression. Student has significant behavioral dysregulation and disinhibitation difficulties. (Tr. 266, - 267, D.E. 42) The Student's behavior does not fit the diagnosis of Bipolar Affective Disorder.

93. According to the Independent Evaluator One, the neuropsychological results indicates that the Student's behavioral dysregulation, including disinhibitation and sensory sensitivities may have two linked etiologies.

According to the Independent Evaluation One, "there is no doubt that his frontal atrophy an lesion in the right caudate nucleus play a significant role in promoting his behavioral dysregulation. Further the intractability of Student's behavioral and emotional deficits and the general ineffectiveness of his previous treatment / placement lend further support to the affect of his central nervous system lesions on his behavioral and emotional presentation. (D.E. 42, p. 21)

94. The Student's sensory sensitivities include a history of sensitivity to loud noises and sensitivity to clothing labels (T. 262)

95. As a result of the neuropsychological evaluation, the Independent Evaluator One recommends: (a) ongoing mental health and psychiatric treatment, (b) in-home therapist who specialized in behavior modification, (c) Student should be placed in a setting whereby he receives "one-to-one instruction...constant supervision and is very structured", (d) intense behavior modification...with consistent reinforces and consequences provided immediately, and (d) his appropriate behavior will need to be reinforced. (D.E. 42) The Independent Evaluator One suggest that one-to-one instruction by a licensed teacher continue until the Student demonstrates that he could handle a less

restrictive educational setting. (Tr. 305) The Student's placement in a Special Elementary Needs, special education (SPEN) classroom has been inadequate. (Tr. 306)

96. Dr. Ziegler testified that Student needs one-to-one instruction, meaning individual instruction from a licensed teacher for a full day in a quiet room. (Tr. 304-305)

97. During the process of the Independent Neuropsychological evaluation, the Independent Evaluator One had to cancel the initial date for testing because the District had not provided the Student's educational record as ordered by the independent Hearing Officer in this matter (Tr. 296-301, H.O. Ex. 34) During the delay in the timeline for evaluation the Student experienced significant deterioration in his behavior (Tr. 301)

98. Therefore, on February 12, 2001 the Independent Evaluator One filed an interim evaluation report regarding the Student. Based on the review of records submitted by the District as well as those documenting the behavioral events at Whittier school, the Independent Evaluator One recommended a placement

of the Student in a full-day Day Treatment placement and concurred with the recommendation of Dr. Foley of Washburn Child Guidance (P.E. B-3)

99. On September 18, 2000 at Keewaydin Elementary School, Student threatened to kill everyone with a knife that he would bring tomorrow. He hit himself, hit and kicked staff. He needed assistance in getting to time-out and was held there by staff. Behavior was unsafe and required interventions by adults to keep him safe (i.e. Banging head on wall). Consequences included: use of "Stop and Think" strategy, time-out, restraint, and quiet time. (P.E.E. 22, D.E. 52)

100. On September 19, 2000 at Keewaydin Elementary School, Student became defiant and refused to follow directions and became anger. Behavior escaladed into aggressive behavior when he hit staff with a pencil and kicked several times. He was given time-out and was restrained about 10 seconds. Consequences included: time-out, restraint and quiet time. (P.E. E-21, D.E. 53)

101. On September 21, 2000 at Keewaydin Elementary School, Student became very defiant and refused to follow adult direction. He refused to do a "Stop and Think so he was given and refused to follow adult

direction. He refused to do a "Stop and Think so he was given a time-out. He walked on his own to the time-out area but when he got there, he kicked at staff, he was restrained for about 30 seconds. He finished his tome out, and then he agreed to work. By 9:25 a.m. he was doing his work with classmates. (Tr.2101, D.E. 57). Consequences included: Stop and think, time-out, restraint, and quiet time. (D.E. 57) In the opinion of Rob Porte, Child Development Technician (CDT), it was clear that Student could process what he was being told to do. (Tr. 2105)

102. On September 22, 2000 at Keewaydin Elementary School, Student was very defiant and refused to do work or follow directions. He became aggressive. He refused to "Stop and Think" about the consequences of his behavior. He went to timeout. He kicked staff and was restrained for about 30 seconds. Consequences included: "Stop and Think, time-out, use of restraint and quite time. (P.E. E-20)

103. On September 29, 2000 at Keewaydin Elementary School, Student was defiant and refused to work. He became very aggressive and threatening. He told staff that on Monday he would bring a knife and gun to school. He threatened to kill staff and himself. He tried to stab staff with pencil and was restrained twice for

about 15 minutes. He was later restrained for an additional 5 minutes. (Tr. 319, D.E. 63) Consequences included: "Stop and Think", time-out, restraint, and quiet time. (D.E. 63) Independent Evaluator One agreed with use of restraint. (Tr. 320, 2107) CDT, Keewaydin suggested that the Student needed to be restrained to protect himself. (Tr. 2108)

104. In the month of September 2000 at Keewaydin Elementary School, Special Education Teacher, Keewaydin testified that in 23 days her class (minus the Student) had a total of 2 restraints. In a total of 14 days of attendance in September, the Student had a total of 7 restraints which was "6 times greater" that the peers in his class. (Tr. 2373-2374, D.E. 89B) The Student was restrained 7 of 14 days or once every other day in September. (D.E. 89B) Student was also attending school half-day 4 days per week and the other students were in school for the whole school day. (Tr. 2378-2379)

105. From October 9/10 – November 13, 2000 at Keewaydin Elementary School. Special Education Teacher, Keewaydin testified that the Student was restrained at a rate "11 times greater than his peers" over this period of time. Over this period of time the was placed in restraint more than half of all days,

(55%). He was physically aggressive at a rate "11 times grater than the peers in his class, more than half lf all days (55%). (Tr. 2385-2386, D.E. 89W) On November 16, 2000 S tudents w as a ggressive a nd t he police were called. (D.E. 89X)

106. In recording the Student's behavior in the classroom from September 14, through October 5, 2000, Special Education Teacher, Keewaydin noted using , The Monitoring Record of B.O.S. (Behavior Objective Sequence) (D.E. 89D) that the Student's goal was to be able to 'redirect when appropriate 90% of the time". Data collection indicates that Student was able to meet this goal at a 29% rate for that period of time. (Tr. 2376, D.E. 89D) Data collection demonstrates an increase in the Student's compliance with many of the behavioral skills being taught including ability to be redirected, complying with one reminder, working though problems, improving interaction, making good choices, recognizing feeling of others, participating in social skills training, verbalization about friendships from October 10, 2000 through approx. November 14, 2000. (Tr. 2381-2382, D.E. 89V)

107. On October 10, 2000 at Keewaydin Elementary School, Student was defiant and aggressive when given directions. He was very slow to respond or

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would not respond at all. Refused to return to work when given "Stop and Think". He earned time-out according to staff. He refused to go to time out and was escorted. When he started kicking he was restrained twice for a total of 8 minutes. Consequences of behavior included: "Stop and Think, time-out, restraint and quiet time. (P.E.E. – 18, D.E. 67) While in time-out the Student tried to bang his head on the wall and tried to spit on staff. (Tr. 2110, D.E. 67) CDT, Keewaydin testifies that the Student did not want to work and he was use to not being required to work in "other places before". (Tr. 2110)

108. On October 11, 2000 at Keewaydin Elementary school, Student came to class very defiant and aggressive and refused to work and began throwing things and was threatening. He was restrained. (D.E. 71) While the Student stated he was anger because his mother had hit him that morning. District staff did not file and incident report of child abuse. Therefore, the Independent Evaluator One believed the this did not rise to the level of significance or creditability that school staff reasonably believed the child was being abused. School staff is responsible to report to child protection if they believe a child is being abused. (Tr. 324-325) Consequences of this behavioral episode

included "Stop and Think, time-out, restraint and quiet time. (Tr. 2112-2113, D.E. 71)

109. On October 12, 2000 at Keewaydin Elementary School, Student was anger and threatening. He refused to follow directions from adults. Student was restrained twice before the other students arrived at 8:35 a.m. He was taken to time-out for kicking staff an was restrained a third time. During restraint he spit on staff and himself. He also began hitting his head on wall and was restrained to keep from hurting himself. During this episode, 3 restraints totaled 12 to 15 minutes, and quiet time was one hour. (Tr. 2114, P.E.> - 16, D.E. 74)

110. On October 18, 2000 at Keewaydin Elementary School, by 10:00 a.m. Student became tired of work and did not want to follow directions. He became defiant and rude when he was asked to finish his works. He threatened staff and when staff ignored his threats he started to hurt himself by banging his head on the door. Consequences included " Stop and Think, time-out, restraint, and quiet time. (P.E.E. 15)

111. On October 24, 2000 at Keewaydin Elementary school at 9:30 a.m., (first occurrence of day), Student quit working. He scribbled on his paper. He was given a "Stop and Think" but he started yelling and

threatening so he was given a time-out. He threw a pencil staff so he was restrained. While in restraint he continued to threaten staff and kick. He his staff with his pencil and threatened to kill staff several times. (Tr. 2116, D.E. 79) Consequences included: Stop and Think strategy – one minute, time-out – 15 minutes, restraint 3 minutes, quiet time, one hour. (D.E. 79)

112. On October 24, 2000 at Keewaydin Elementary school at 11:30 a.m. (second time in half-day of school) Student was defiant, angry and threatening. He pushed staff spit at staff and threatened to "bring a gun and kill everyone." Consequences of behavior included: time-out for 20 minutes, restraint for 5 minutes and quiet time for one hour. (Tr. 2115, P.E.E. – 13, D.E. 80) Student was restrained twice at this time. (D.E. 80)

113. On November 16, 2000 at Keewaydin Elementary School, Student was escorted off of the bus because he would not disembark. Student pushed and kicked staff and threatened to kill them. Student was yelling and threatening peer and wiping snout on them. Student refuses and complained about expectations of doing anything. He began wondering around the classroom pushing things, throwing erasers at staff. Kicking and hitting. Consequences included: loss of bus points, Stop and Think strategy, time-out, restraint for over 20

minutes with periodic break to see if he could handle himself. The police were finally called and Student was removed. (Tr. 2118-2119, D.E. 83)

114. On December 6, 2000 at Keewaydin Elementary School (9:00 a.m. occurrence one), Student was very anger and defiant. The Student was physically and verbally abusive and refused to follow directions from adult. Consequences included: "Stop and Think" for one minute, time-out 20 minutes, restraint for 5 minutes and quiet time for 2 ½ hours. (P.E.E. – 11, D.E. 85)

115. On December 6, 2000 at Keewaydin Elementary School (12:30 p.m. Occurrence two), while waiting for the bus to Washburn the Student argued with another student. He refused staff direction and pushed and hit a staff member. He said, he would hit anyone he wanted to. Consequences included: teacher and principal notified, assault charges would be filed. Parent called, and suspend for two days. (Tr. 2120-2121, D.E. 84) This was the last day the Student attended Keewaydin Elementary School. (Tr. 2121)

116. Parent testified that the police were summoned twice to intervene in Student's in-school behavior at Keewaydin. (Tr. 2965)

117. In his review of the record and the behavior incidents at Keewaydin Elementary School, the Independent Evaluator One "had a hard time finding any "positive behavior interventions utilized. (Tr. 413) Overall, the experience at Keewaydin Elementary was a failure for the Student. (Tr. 482)

118. Rob Porte is a Child Development Technician (CDT) told Parent that the Student was very much in control. CDT, Keewaydin testified, "He was very manipulative and unless he was stopped from being allowed to not do w hatever he didn't want to do, by saying that his head hurt, or he didn't want to hold on to the pencil or anything – you know, always every day it se emed to be something different – that Student would just continue to try and get out of doing whatever he didn't want to do." (Tr. 2123) CDT testified that Parent was looking for excuses concerning Student's behavior. (Tr. 2123) CDT testified that his was a "very positive" environment for the Student. (Tr. 2414)

119. Special Education Teacher, Keewaydin testified that, in her opinion, the Student is not disabled in the school environment. (Tr. 2483)

120. Special Education Teacher, Keewaydin testified that the Student was making academic and behavioral progress in her classroom. (Tr. 2345)

121. Special Education Teacher, Keewaydin testified that she participated in completing requests for information from outside agencies. (Tr. 2389-2390, D.E. 59, 60)

122. Rob Porte, is a Child Development Technician (CDT) assigned to Elena Schroeder's special education classroom at Keewaydin School. Rob Porte, (hereafter, CDT, Keewaydin) met the Student in the fall of 2000 when he was assigned to the classroom in which he worked. (Tr. 2076) Student was in the classroom for almost three months. (Tr. 2076)

123. Rob Porte, CDT Keewaydin testified that he did not believe the Student was disabled. (Tr. 2131)

124. Special Education Teacher, Keewaydin testified that during a phone call with the Parent she stated that the Parent's claim of frontal lobe and brain injury problems for the Student was an excuse for allowing him to do what he wanted to do. (Trl 2411)

125. Student was never in mainstream classroom at Keewaydin. (Tr. 2420) He was with regular education

students at lunchtime, and in media center. (Tr. 2420) The time-out area for the classroom is in the back hallway; it used to be a coatroom. (Tr. 2432) The average student in the classroom stayed in time out for approx. 10 minutes. The Student averaged approximately 30 minutes. (Tr. 2433)

126. Parent testified that putting the Student back in the classroom of Special Education Teacher, Keewaydin would be harmful to him. (Tr. 2971-2972)

127. In the opinion of Independent Evaluator One, the Student is in need of a more intensive program than the program that was being offered by the District (Tr. 327-328) Independent Evaluator One recommended Echo-Winnetka as an appropriate program for the Student. (Tr. 329)

128. Student was at Whittier Elementary School for a total of seven days. Six of these days were half days. (Tr. 378) The Student spent three of these days in extended period of locked seclusion. (Tr. 378)

129. The Independent Evaluator One does not believe that either Harrison program or River West program is appropriate placements for the Student because of the lack of individualized therapy for the Student in both

programs. In the opinion of the Independent Evaluator One, regular individual psychotherapy should be a part of the Student's educational program (Tr. 354-355)

130. The Student was not in school from December 6, 2000 until he began school at Whittier Elementary.

131. The Student began Whittier Elementary on Tuesday, January 16, 2001 (Tr, 2165)

132. On January 19, 2001 the Student refused to follow directions which lead to a chain of events from approximately 11:40 p.m. to approximately 12:45 p.m. When Student was given a choice to follow direction or to go to time-out room, the Student refused to comply and was escorted to time-out. From approximately 11:45 a.m. until 12:45 p.m. the Student intermittently kicked the door, spit, and was non-responsive to directions (P.E.E. – 4) From the review of these educational records, Independent Evaluator One noted no positive behavioral interventions that were used that were effective with the Student during this incident. (Tr. 377)

133. On January 22, 2001 the Student scribbled on his point sheet at approximately 10:15 a.m. Next, the Student took a pencil and began to write on his desk.

His desk was removed. Student then started writing on chair. Pencil was removed from Student's hand. This behavioral sequence escaladed until the Student was placed in time-out room at 10:30 a.m. The Student displayed intermittent dysregulated behavior including hitting door, throwing self against door, and hitting glass in door between 10:30 and 12:00 noon. At noon he returned to classroom. (P.E.E. – 3) In his review of school records, the Independent Evaluator One saw no positive behavioral interventions in the incident as described. (Tr. 376)

134. On January 24, 2001 the Student was requested to set at his desk and do work. He did not get his work done and complained of his head hurting. He shoved his desk and it was removed. Soon he got out of his chair he was escorted to the time-out room at 10:08 a.m. Screaming, hitting and kicking ensued in the time-out room. This behavior continued in the time-out room on an intermittent basis until the police arrived at 11:30 a.m. and the Student was removed from school. (Tr. 364365, Tr. 2207-2209, P.E.E. – 2) The police in handcuffs removed the student from the school. (Tr. 2209-2214) He was removed from the school in handcuffs. He was sent to the crisis center at HCMC. He was displaying suicidal tendencies such as wrapping his shirt around the door handle and around

his neck. The Special Education Teacher, Whittier called Dr. Don Allen for consultation. He believed that calling the police and having them take the Student to the hospital was the correct plan of action. (D.E. 130, P.E.E. – 2) On this date, Wednesday January 24, 2001 the Student was suspended from Whittier Elementary School for one day (January 25, 2001) for kicking a staff member. (P.E.E. – 1)

135. On January 29, 2001 a prehearing teleconference was held including Parent counsel, District counsel and the Hearing Officer. During the prehearing conference and given the suicidal gestures and ideation of the Student on January 24, 2001 at Whittier School, Parent strongly supported the move of the Student to homebound instruction from his placement at Whittier School until the hearing was completed. The District agreed to provide homebound instruction to the Student. As a result, on the record, the Hearing Officer ordered 3 hours per day of homebound instruction be provided t the Student by the District in collaboration with the Student's educational participation at Washburn Day Treatment Center for the remainder of the school day. District was required to move post-haste to find someone to provide homebound instruction and ordered to provide the Hearing Office and parties with immediate notification during

homebound instruction. (H.O. ex. 69, Prehearing Conference Transcript, January 29, 2001.) The Student did not return to Whittier Elementary School. (Tr. 475)

136. Jane Groh is a licensed regular education teacher and licensed EBD teacher. (Tr. 1008) She was contacted by the District to provide three hours of homebound instruction services to the Student and she accepted the assignment on Friday, February 9, 2001. (Tr. 1009-1010, D.E. 133)

137. On Tuesday February 13, 2001 the Ms, Groh attended a meeting at Whittier School with the special education teacher and the principal. At that time the witness was presented with curriculum materials and copies of two IEP's (D.E. 133) These IEP's were those from October 2000 and January 2001. (Tr. 1029)

138. On Wednesday, February 14, 2001 the Jane Groh (hereafter, Homebound Instructor) met with the Parent at the Student's home. At that time, the Parent provided the witness with more background information and names of other people to contact who had worked with the Student. (Tr. 1015, D.E. 133) On Wednesday February 13, 2001 the witness was introduced to the Student. (Tr. 133) On Wednesday February 13, 2001 the witness was introduced to the

Student. (Tr. 1018) The Parent explained to the Homebound Instructor that she and the Student has plans for the release days of February 15 and February 16, 2001 and they jointly decided to begin the homebound instruction on Monday February 19, 2001.

139. Homebound instruction was provided on Monday February 19, 2001. When the Homebound Instructor returned on Tuesday February 20, 2001 to continue homebound instruction, she was told by the Parent that the Parent had decided to enroll the Student in Calvin Academy on Tuesday February 22, 2001 and that he Student would not need her services any more. (D.E. 133) The witness testified that the Parent had seen the Student's behavior deteriorating since he was not attending regular school and that she was anxious to return him to a school setting. (Tr. 1027, D.E. 133)

140. On February 20, 2001 Parent notified the Hearing Officer and District that the Student had been unilaterally placed at Calvin Academy and that he would begin on Thursday February 22, 2001 (H.O. Ex. 88)

141. Parent testified that the provision of homebound services took about three weeks and the Student's behavior was deteriorating. In addition, the Student

was without services of Washburn Child Guidance. (Tr. 3030-3033)

142. Parent testified that during the period of time after January 26, 2001 she began to explore Calvin Academy as a placement for Student. (Tr. 3033-3034)

143. Parent testified about the information she gathered and about Calvin Academy and the decision to enroll him at her own expense. (Tr. 3035-3036)

144. Based on the correspondence from the Parent on February 20, 2001, the complaint for hearing was amended to include a remedy for reimbursement of the costs of enrollment for the Student in private school placement. (See H.O. 89)

145. Independent Evaluator One testified that calling the police was an indication of the failure of the educational program. (Tr. 381) And in his review of the educational record, the use of time-out seemed to escalate the Student's behavior. (Tr. 403) Having reviewed the record of behavior interventions of Whittier staff on January 22 and January 24, 2001, Independent Evaluator One believed District staff handled the Student inappropriately. (Tr. 481)

Placement at Whittier Elementary School was a failure for the Student. (Tr. 481)

146. Independent evaluator One testified that the SPEN program at Keewaydin and Whittier were not appropriate programs for the Student and at this time the Student is not capable of functioning in SPEN setting. (Tr. 383-385) The Independent evaluator One's review of the records indicated that his behavior worsened since his placement in SPEN program in the District. (Tr. 419)

147. Independent Evaluator One testified that when the Student had a behavioral infraction at Whittier "it was met with consequences which may not have fit the infraction." (Tr. 380) The witness further testified that "there was no good reason to keep him in a setting in which he was spending a great deal of time in seclusion."

148. Independent Evaluator One testified that the Student received educational benefit from his placement in the District in terms of his academic program. (Tr. 260) However, based on the review of records the witness could not detect educational benefit in the development of emotional, behavioral, or social skills in the District. (Tr. 390) The witness was not able to

identity any positive behavioral intervention program in recent vintage in the District educational program. (Tr. 404)

149. Independent Evaluator One testified that he canceled two appointments to begin the Student's neuropsychological evaluation due to the fact that the District had not provided the Student's educational records. (Tr. 398)

150. Independent Evaluator One (IE One) recalled that Dr. Czaplansky – Bielman recommended one-to-one assistance for the Student at the beginning of the school year. In the review of the record, IE One noted that Student was provided one-to-one assistance for a very limited amount of time at the beginning of the school year. (Tr. 405)

151. Jeffrey Wozniak, (hereafter, Pediatric Neuropsychologist II), evaluated the Student in February and March of 2000 at the request of Dr. Katrarzyna Litak, psychiatric resident and M.D. At the time of the evaluation, the Student was experiencing significant behavior problems including temper tantrums, aggression, oppositional behavior, and behavior associated with suicidal ideation, treats, and verbalizing thoughts of suicide. (Tr. 542) The purpose of the neuropsychological evaluation was to determine

the Student's functioning level and to evaluate the possibility of non-psychiatric contributions to his behavior problems including brain injury and attention deficit disorder (ADD). (Tr. 515, 521-523) Pediatric Neuropsychologist II reviewed records including IEP from the District and single MRI as part of the evaluation process. (Tr. 525) The evaluation report of Pediatric Neuropsychologist II noted that "recent MRI findings were suggestive of mild frontal lobe atrophy and a cystic area in the right caudate nucleus. He (Student) has a history of febrile seizures and hypersensitivity to visual, auditory and tactile stimuli." The Student was 8 years, 3 month old. (D.E. 145)

152. The neuropsychological evaluation report completed by Pediatric Neuropsychologist II indicated that the Student was of average intelligence (FS IQ of 102), and functioning in the low average range in Basic Reading (SS –88), average in Mathematics Reasoning (SS-100) and below average in Spelling (SS-92) (Tr. 555). Further, the evaluation report suggests: Student "is experiencing significant problems wit anxiety and attention. Student tend to be anxious about his ability to perform tasks; he readily engages in tasks that he believes he will be good at, but becomes inattentive / distractible and engages in a variety of negative behaviors to avoid performing tasks he perceives will

be more difficult for him. These problems with anxiety and attention do not appear to be a result of this neurological issues." (D.E. 145) In the opinion of this evaluator, the Students behavior had been learned over time and the temper tantrums did not appear t be primarily due to mood dysregulation. (D.E. 145)

153. In a review of the evaluation by Pediatric Neyropsychologist II, Dr. Wozniak, Independent Educational Evaluator One, believed that Dr, Wozniak failed to report the effects of significant central nervous system lesions on the Student's behavioral and emotional functioning and as such "missed the boat" in terms of integrating the results of MRI suggesting frontal lobe atrophy in the cystic region of the brain into his impressions of the Student's functioning in relationship to the Student's central nervous lesions. (Tr. 223-234)

154. Base on his evaluation, Pediatric Neuropsychologist II made the following suggestions in his evaluation report: (a) Parent receive some parenting assistance around the Student's temper tantrums, (b) Student be provided extra time to complete written tasks and assistance with his need to deal with feelings of being overwhelmed when presented with significant amounts of verbal information, (c) Student receive

psychotherapy to develop coping skills and deal with anxiety, and (d) anti-anxiety mediation. (D.E. 145)

155. At the time of testimony in this matter, Pediatric Neurophychologist II was unsure as to whether or not what shows up on the MRI affects the Student's behavior. (Tr. 571)

156. Pediatric Neurophsycologist II had no reason at the time of the evaluation to believe the Parent was not candid and truthful in her presentation of information during the evaluation. (Tr. 577)

157. Am evaluation of the Student's Occupational Therapy needs was conducted by Rebecca Catterton, Pediatric Occupational Therapist (hereafter, Independent Evaluator OT) as part of the Individual Educational Evaluation in this matter (D.E. 140)

158. The OT evaluation took place on January 30 and February 1, 2001. (Tr. 628) Student demonstrated skills in the 2nd part percentile (compared to peers) for both fine and gross motor on the Bruininks – Oseretsky Test of Motor Proficiency and in the first percentile in the Battery Composite which is the score that summarizes the performance on all 8 subtests including gross motor and fine motor skills. (D.E. 140)

On the MN Handwriting Assessment, when this 3rd grade student was compared to 2nd grates in the 2nd half of the school year, Student performed like peers of that age in 1 area (Rate), performed somewhat below peers in 2 areas including alignment, size and spacing, sand performed well below peers in 2 areas including legibility and from. (D.E. 140) Student also presented with sensory integration dysfunction. (D.E. 140). It was the recommendation of the Independent Evaluator # 2 that a program of occupational therapy be established to address sensory integration dysfunction and deficits in fine and gross motor skills. (D.E. 140)

159. The Independent Evaluator OT reviewed the OT evaluation completed by the Private OT in August / September 1999 (D.E. 95) as well as the OT re-evaluation of the Student completed by the Private OT in October 2000 (D.E. 64) as part of the record review of the Independent OT evaluation competed by Independent Evaluator OT in January / February 2001. During testimony, the Independent Evaluator OT agreed in with the philosophy of each goal recommended in the 199 evaluation and the October, 2000 re-evaluation, (Tr., 641) The Independent Evaluator OT testified that her evaluation endorsed the suggestions made earlier by the Private OT. (Tr. 649)

160. Lucy Maloney, Occupational Therapist, Keewaydin (hereafter OT Keewaydin) met the Parent for the first time at an August 29, 2000 IEP meeting regarding the Student. At that time, the Parent informed the OT Keewaydin that the Student had been receiving OT services outside the District. (Tr. 698) At the August 29, 2000 IEP meeting a decision was made by the team and at the request of Parent to assess the Student for occupational therapy needs. (Tr. 697-68) As part of the OT assessment at Keewaydin, the Student was given the Test of Visual – Motor Stills Revised to measure the Student's ability to copy a variety of forms with a pencil. According to test results, the Student scored in the 79th percentile. (Tr. 700-701) The OT Keewaydin also administered the Test of Visual – Perceptual Skills (non-motor) to the Student. According to the findings of the OT Keewaydin, the student had excellent visual – perceptual skills and ranked in the 96th percentile compared to his peers. (D.E. 97) The OT Keewaydin also completed a portion of the Minneapolis Handwriting Screening tool with the Student. This instrument is an informal and non-standardized instrument. (D.E. 100) In her assessment summary report dated October 10, 2000, the OT Keewaydin summaries the findings by summarizing that the Student "has strong visual perception skills and no motor problems that would impact the

difficulties with printing he is displaying in the classroom...He uses his strong verbal skills to avoid 'work'. (D.E. 103)

161. The October 10, 2000 Assessment Summary Report provided by the OT Keewaydin noted that when the Student was asked to copy near and far point sentences he did a great deal of complaining and crying. OT Keewaydin noted the Student really dislikes printing and that he does not space well between words and mixes upper and lower case letters. Student's sample of classroom work reflects fair to poor legibility. (D.E. 102) The Assessment Summary Report was shared at the October 10, 2000 IEP meeting. The Parent did not seem please with the results when presented. (Tr. 722-723)

162. According to the assessment results of the fall, 2000 occupational therapy assessment completed by the OT Keewaydin, the Student was not in need on OT services and OT services were not recommended. (Tr. 750) The results of the assessment of the OT Keewaydin (D.E. 102, and D.E. 103) sharply disagree with the results of the Private OT assessment (D.E. 95, D.E. 64) and the Independent Educational Evaluation of Occupational Therapy assessment results by the Independent Evaluator OT (D.E. 140).

163. OT Keewaydin recalls reading the OT assessment report of the Private OT and did not have any reason for disagreeing with the assessment results. (Tr. 739) The results of the Private OT assessment report were not discussed at either the first or second IEP meeting regarding the Student at Keewaydin. (Tr. 774-775)

164. Omar Othman, (hereafter Independent Evaluator Three) is a licensed psychologist at well as a certified behavior analyst. The Independent Evaluator Three completed an independent functional behavior assessment (FBA) completed by the Independent Evaluator Three noted that there is not a consistent chain of behaviors leading to the emission of intense target behaviors and it is difficult to describe Student's behavioral chain without addressing environmental antecedents. (D.E. 141) However, the Independent Evaluator Three testified that you can predict, from the environmental antecedents, that there is an increase in probability of the target behaviors. (Tr. 838-389) Time-pressure and the lack of clarity understood schedules increase the likelihood of the emission of targets. Aggression, property destruction, self-injurious behavior, threats, yelling and noncompliance occur in context of increasing levels of instructor intervention, but also occur independently of instructor intervention and attention. Student seems to emit

target behaviors against instructors an the Parent in the following behavioral chain: Noncompliance, violation of instructor or Parental space (not letting the authority leave), threats, property abuse, physical aggression, and self-injurious behavior. (D.E. 141)

165. According to the Independent Evaluator Three, Student's target behaviors are used by the Student to terminate the behavior of others, punish those who try to control his behavior, and to express anger resulting from frustrations and anxiety. (D.E. 141) The primary function of Student's target behaviors seems to be avoidance and escape. (Tr. 844, D.E. 141)

166. In constructing the FBA evaluation, Independent Evaluator Three observed the student at home, school and during the Independent OT assessment. (D.E. 141) During the time frame of the behavioral observation in the school setting, the Student was in locked seclusion for the entire three-hour observation. (Tr. 827) As a result of the FBA evaluation, the Individual Evaluator Three recommended (a) the Student may need an entirely individualized program with a Level IV or V placement. (b) Student responds better to ignoring, planning his schedule, planning breaks flexibility in scheduling, gentle guidance and one-to-one positive interaction. (c) Student exhibits fewer problem

behaviors in a highly structured positive and non-threatening environment. (d) Student would benefit from the systematic use of occupational therapy strategies embedded within his behavior plan to help structure and organize his day at school and at home. (e) Student could benefit from the use of behavior analyze in both home and school settings to help implement and develop his behavior plan. (f) Student should be in an academic setting where he has more access to regular peers, but in which he continues to receive one-to-one instructional assistance and therapeutic support. (g) Student could use the support of a commonly-based therapist to assist in his development of communication, social, and friendship skills.

167. According to the testimony of the Independent Evaluator Three, the Student needs a program that is individualized. (Tr. 862) The Independent Evaluator Three believes the Student is in need of occupational therapy since the Student presents some significant sensory integration difficulties. (Tr. 863) He testified that occupational therapy should play a big role in the Student's educational program. (Tr. 864)

168. During the review of records in this matter, Independent Evaluator Three reviewed the FBA

compete by Dr. Sherrie Lindborg (hereafter, School Psychologist, Keewaydin) in fall, 2000. Independent Evaluator Three agreed with School Psychologist Keewaydin in saying: Student's refusals are ways of avoiding work or circumstances that he perceives as too demanding. (Tr. 867) In general, Independent Evaluator Three agrees with the impressions of School Psychologist, Keewaydin in her FBA report. (Tr. 870, D.E. 78)

169. In reviewing the record from the District, Independent Evaluator Three noted a behavioral program that used a medallion in the past. The Student showed the medallion, left the classroom, and came back to the classroom when he way ready to perform the task. This program seemed to result in the elimination of target behaviors. (Tr. 875-876) The Independent Evaluator Three indicated that he looked at successful interventions in the past to try to incorporate. (Tr. 876)

170. Independent Evaluator Three found Parent very candid during the evaluation. (Tr. 877) He also testified that the Parent was resourceful, committed and sophisticated Parent with respect to attending to the behaviors elicited from Student. (Tr. 884)

171. In testimony, Independent Evaluator Three noted academic progress in the Student record. (Tr. 852-853), however, he did not see evidence in the record (with the exception of the medallion program) that the Student had gained behavioral skills, emotional skills or coping skills in his educational program. (Tr. 897-898)

172. The Independent Evaluator Three testified in hearing that he attended the reentry meeting held at Whittier Elementary School and at that meeting a decision was made that the student would not be returning to the Whittier program. (Tr.923) Therefore, there was no need for the District and Washburn Child Guidance Center to share information since the student would not be a student in the District. (Tr. 923)

173. During testimony, the Independent Evaluator Three testified that the student was not in need of a more restrictive program than the setting three found a Whittier Elementary School. (Tr. 927)

174. Dr. Sherrie Lindborg, (hereafter, School Psychologist, Keewaydin), is the school psychologist assigned to Keewaydin School. She is assigned to three schools and she spends from 2 to 8 hours a week at Keewaydin elementary school. (Tr. 930-931)

175. School Psychologist, Keewaydin first got involved with the student by attending a team meeting at Keewaydin School on august 29, 2000. (Tr. 933) At the team meeting on august 29, 2000 it was decided that the Student would be assessed to "gather and analyze information about the patterns of his misbehavior and to determine his current level of functioning for fine motor and visual perception." *Parent and teacher report, as well as outside agency evaluation were to be used in collecting data as well as testing. (D.E. 40) A Notice of Educational Assessment / Reassessment was completed to include (a) Fine motor skills and visual perception testing, and (b) a Functional Behavioral Assessment (FBA). The School Psychologist, Keewaydin was identified to complete the FBA. The Parent signed the Notice of Educational Assessment / Reassessment on August 29, 2000 (D.E. 40)*

176. At the August 29, 2000 team meeting, the team discussed the Student entering the classroom of Mary Ellen Thompson as well as discussed interventions that had been used for the Student in the past including the use of a medallion for him to carry and go and discuss issues that he might have with someone else. (Tr. 983)

177. To complete the FBA authorized on August 29, 2000 the School Psychologist, Keewaydin did classroom observations of the Student on September 6, 15, 20 and S eptember 27, 2000. She conducted interviews with Student, school staff and Parent and did a file review. (Tr. 938-939, D.E. 78) during the file review, the witness reviewed records from outside agencies including the neuropsychological assessment completed at the University of Minnesota by Dr. Jeffery Wozniak. (Tr. 946-947. D.E. 145)

178. School Psychologist, Keewaydin noted some improvement in the amount of time required for redirection of the Student's behavior over the period that she observed his behavior for the FBA. (Tr. 940-941) Student was assigned to two different teachers during time of observation. (Tr. 941) School Psychologist, Keewaydin never observed the student during a period in which he was enraged. (Tr. 945)

179. School Psychologist, Keewaydin noted three components to the Student's behavior. (a) doing things that were annoying, (b) refusing to work, and (c) a state of rage. (Tr. 950)

180. School Psychologist, Keewaydin also met with the educational team to discuss the student on August 31,

2000. In that meeting, the witness testified that the plan for addressing the behavioral needs of the Student that was discussed was not written as a behavioral intervention plan nor in the Student's IPE to her knowledge. (Tr. 1087) it was the testimony of the witness that the notes of the August 31, 2001 meeting reflected the plan for the first two weeks of school (Tr. 1096, D.E. 43)

181. School Psychologist, Keewaydin testified that the District has a policy that when students physically hit or strike other students or staff, then the police my be called, (Tr. 1098-1099)

182. The School Psychologist, Keewaydin also attended a meeting regarding the Student on September 12, 2000. At that meeting there was a discussion of the Student's difficulties in writing and discussions of changing the Student's classroom. (Tr. 982)

183. On October 10, 2000 the School Psychologist, Keewaydin attended a team meeting regarding the Student at Keewaydin. Part of the purpose of the meeting was to discuss the FBA and OT assessments that had been completed. At the meeting the School Psychologist, Keewaydin noted that the Parent

expressed her disappointment with the occupational therapy report. (Tr. 955-956)

184. On October 11, 2000 the Parent wrote a letter to acting principal of Keewaydin Elementary School and the Director of Special Education of the District formally disagreeing with both the FBA conducted by School Psychologist, Keewaydin and the OT assessment conducted by the OT Keewaydin. At that time the Parent requested evaluations be performed by an outside psychologist and occupational therapist at the District's expense. (D.E. 73) the parent believed the FBA report from the school psychologist, Keewaydin contained inaccuracies. (Tr. 957, D.E. 73) the Parent reported that the FBA did not include an interview with the Parent as identified in the FBA report by the School Psychologist, Keewaydin, and the Parent included her concerns that the report was completed in the first 14 days of school during a transition to a more demanding and structured classroom. In addition, the Parent stated that the FBA report contained inaccurate information regarding the Student's medications. (D.E. 78, D.E. 73) as a result of the parent's input, School Psychologist, Keewaydin modified her report and submitted a corrected report. However, the findings and conclusions remain the same. (Tr. 958 – 960,

D.E. 78) the report was modified on October 23, 2000. (Tr. 971) the School Psychologist, Keewaydin testified during hearing that she never did have a personal interview with the Parent (tr. 997)

185. The School Psychologist, Keewaydin also attended a meeting regarding the Student on November 14, 2000. At this meeting the witness testified that the team discussed interventions to be used when the Student was "out-of-control" including calling the police liaison officer from Roosevelt to assist. (Tr.985) The Parent objected to this proposed intervention. (Tr. 987) Witness testified that Keewaydin School lacked space for the student to go to in which he could be self-contained. (Tr. 985)

186. At the November 14, 2000 team meeting, there was another request for a one-to-one aide for the student by the parent. The School Psychologist, Keewaydin remembered the Parent requesting an aide since the August 29, 2000 meeting. According to the School Psychologist, Keewaydin, the Student's teacher, Elana Schroeder believed that one-to-one assistance might foster dependency and interfered with her program. (Tr. 992-993, 1051)

187. School Psychologist, Keewaydin testified that the use of the "Stop and Think" strategy was unsuccessful based on her review of the records (Tr. 1032) and the Parent requested that this program be implemented at Keewaydin for the Student. (Tr. 1037)

188. School Psychologist, Keewaydin testified that the Parent reported about the successful behavior program used with Student at the Park View Elementary School at the team meeting on August 29, 2000. (Tr. 1036)

189. School Psychologist, Keewaydin testified That she believed there my be some relationship between Student's brain injury and his challenging behaviors. (Tr. 1039)

190. On January 9, 2001 Ann Gunn-Smith, (hereafter, District Monitoring and Compliance Specials) attending a team meeting regarding whether the Student would be attending Whittier Elementary School. The meeting included an open discussion of issues regarding the Student. (Tr. 1113 – 1117) There was, however, much argument between team members regarding the scope of what could be discusses at the meeting. Tr. 1171) At the meeting the team agreed that the Student needed a one-to-one paraprofessional in order to attend Whittier SPEN. (TR. 1172) The

District Monitoring and Compliance Specialist agreed to facilitate the placement of an "additional adult assistant" (educational assistant) in the classroom if the Parent chose to have the Student attend Whittier Elementary. (Tr. 1115) There was a paraprofessional in the Whittier School program reassigned to work with the Student until the position could be filled. (Tr. 1173)

191. Approximately January 9, 2001 team meeting ,the Parent notified the Principal of Whittier, Sue Poston, that the Student would enroll at the Whittier SPEN program. (Tr. 1171)

192. Approximately January 24, 2001 the District Monitoring and Compliance Specialist received a phone call from the Keewaydin Social Worker, Linda Azure, regarding the suspension of the Student and to schedule a meeting. (Tr. 1123-1124) This meeting was a re-entry meeting. (Tr. 1178)

193. A meeting regarding readmission of the Student was held at Whittier on January 26, 2001. (Tr. 1126) Persons attending the re-admission m eeting i ncluded. Bobbie Evans, Amy Goetz, attorney for the Parent; Parent; Janice Ostrom; Jennifer Staufferecker; Lorraine White; Omar Othman, Independent Evaluator

Three, Dee Lraay; Ann Gunn-Smith, the witness; James Selmer, attorney for the District; school social worker, Linda Azure; Don Allen, Kristi Ward and Tammy Goetz, assistant principal. (Tr. 1129-1131) Tom Steinmetz was present prior to the meeting as a representative of Washburn Child Guidance Center but was provided a letter of revocation from the Parent, which withdrew the right of Washburn to exchange and share information with District. Therefore, Mr. Steinmetz left the meeting. (Tr. 1132)

194. At the meeting on January 26, 2001 the Parent conveyed to the District that the Student would be returning to Whittier Elementary School as a student. Student had attended Whittier Elementary School for a total of seven half-days. (Tr. 1133)

195. The District Monitoring and Compliance Specialist testified that the Student was not present at Whittier School long enough to establish a pattern of behavior. She testified that two to six weeks are needed in an educational setting to establish patterns.

196. On February 19, 2001 the Parent notified the District that the Student's emotional, social and behavioral status continued to deteriorate and that it was the

intent of the Parent to seek private school placement at public expense. (P.E.H – 3)

197. Sue Poston, (hereafter, Whittier Principal) met the Parent for the first time on December 18, 2000. This first contact was because the Parent was looking at Whittier Elementary School as a possible placement for the Student. (D.E. 1211)

198. Whittier Principal attended the January 9, 2001 meeting. The Witness testified that at the meeting there was an open flow of ideas. The team decided a one-to-one adult assistance would be appropriate. (Tr. 1218)

199. During the January 9, 2001 team meeting, the Parent indicated that she was uncertain about whether Whittier was an appropriate program for the Student. (Tr. 1221) However, after the meeting and on the same day, the Parent indicated to the Whittier Principal that the Student would be enrolling in Whittier SPEN. (Tr. 1221, 1243)

200. Whittier Principal testified that during this team meeting on January 9, 2001, Kristi Ward, Whittier SPEN teacher, registered her concern over the level of need of the Student for locked time-out. (Tr. 1248) At

the meeting, the team discussed Crawford Elementary as a possible placement opinion to Whittier. (Tr. 1243, 1248-1249)

201. Whittier Principal also testified that the Parent asked that the calming strategies that Student's private OT had recommended for him be employed with the Student at Whittier. (Tr. 1273-1274) In addition, the Parent described a pass system that had been successfully with the Student at Parkview Elementary School in the past so that the Student could be given to pass to leave the classroom and calm down the talk to someone before returning to class. (Tr. 1274)

202. A notice was provided to Whittier Principal on December 8, 2000 that the Student may be enrolling and that an IEP team meeting needed to be scheduled. (D.E. 106) The team meeting was scheduled on January 9, 2001. Whittier Principal testified the January 9, 20001 was the first possible meeting date between the Parent visitation at Whittier on December 18, 2001, Winter break, which started on December 22, 2001, (Tr. 1266) and the return from Winter break.

203. Linda Azure, (hereafter, School Social Worker, Whittier) met the Parent during her tour of Whittier on

December 18, 2000. At that time, the witness did not know anything about the Student other than that he might be attending. (Tr. 1298)

204. On December 19, 2000 the School Social Worker, Whittier sent out a Notice of Team Meeting regarding a proposed meeting on January 9, 2001 regarding the Student. The School Social Worker, Whittier included information about parental rights with this mailing as in her standard practice. (Tr. 1306 – 1307, D.E. 107)

205. At the January 9, 2001 team meeting, a Notice of Proposed Special Education Services and a document providing Notice of Significant Changes to IEP (Move from Keewaydin SPEN to Whittier SPEN) was completed. (Tr. 1416, D.E. 109) The information on this form was not sent home to the Parent until the Student's first day of school, which was January 16, 2001. (Tr. 1443) The Parent did not agree to this these changes as she had additional questions regarding one-to-one assistance, ESY services, incorrect information, as well as the Student's behavioral intervention plan. (Tr. 1351, D.E. 123) and made suggested modifications in the material sent home for signature responding to the request for signature by signing "I need further information" on January 17, 2001. (D.E. 123) Parent also registered her concern that Extended

School Year (ESY) would not addressed. (Tr. 1356) The Parent requested ESY for the Student. (Tr. 1363, D.E. 118 p. 7) The Parent clearly had input on the design of the January 2001 IEP as agreed to on January 18, 2001. (Tr. 1471, P.E.C. – 6, P.E C – 7)

206. Conference Summary notes completed by the School Social Worker, Whittier indicated that (a) Student would start at Whittier on January 16, 2001, (b) an educational assistant would be provided by the District to work with Student, (c) Parent registered her concern during the meeting regarding the use of locked time-out with the Student as well as her concerns that "When restrained, it does escalate his behavior." (Tr. 1518-1519, D.E. 112) The Parent agreed that the Student could be restrained if he was a danger to himself or others. (Tr. 1531, D.E. 112)

207. Three components were listed under "PLAN" in the notes summarizing the team meeting on January 9, 200. First, 'crisis intervention" was listed. Second, "De-escalation to prevent behavior happening." Third, sensory integration". (D.E. 112) According to the testimony of the Social Worker, Whittier, "...that would need to be addressed if he cam to Whittier." (Tr. 1535)

208. Social Worker, Whittier testified that during the January 9, 2001 team meeting the Parent requested the use of "calming activities" that had been successfully used in the past with the Student and to make sure that those interventions were used with the Student at Whittier. (Tr. 1432) The Parent talked about four pages for calming activities in the file about sensory integration ideas that were identified to be used with the Student before his behavior escaladed. (Tr. 1529-1530) Parent also suggested the use of a medallion that had been used by the Student at a previous school as a positive behavior intervention at the January 9, 2001 meeting. (Tr. 1523)

209. On January 9, 2001 the Social Worker, Whittier also completed a Special Transportation Request form with the assistance of the Parent. (Tr. 1317, D.E. 111) Mother requested and wrote on the form that a bus aide was required for the Student as well as a need for a separate space next to the adult aide for the Student. (Tr. 1318, D.E. 111) It was decided at the meeting that the Student would begin at Whittier school after a few days in order to get a one-to-one aide in place, transportation in place and to provide the Student time to visit the program. (Tr. 1400-1401)

210. Student's bus transportation to Whittier was in place before he started school at the site. (Tr. 1321, D.E. 113) The Student officially registered by his Parent on January 16, 2001. (Tr. 1322, D.E. 114)

211. The Parent signed released of information for the independent evaluators to receive records from the District on January 11, 2001 and provided it to District counsel. (P.E.H – 18)

212. On January 18, 2001 the District provided a Notice of Proposed Special Education Services to the Parent. This included documentation of the changes in the IEP including the change from Keewaydin to Whittier School. The Parent agreed to the proposed changes and placement of the Student at Whittier School and signed the Notice on January 18, 2001. (D.E. 116) Included in the document was that the Student was participating in one-half Day Treatment Programming at Washburn Child Guidance. (D.E. 116) In the Adaptations section of the Significant Change form was a modification of the suspension policy of the District. The suspension policy was modified as follows: "....to reduce the number of days suspended, and to only suspend in case of physical aggression and to only suspend in the case of physical aggression to adults / students / property. The suspension will be

modified to only one day if this should occur." (Tr. 1334-1335, D.E. 116, Adaptation Section)

213. A reentry meeting was scheduled and held on January 16, 2001 as a result of the suspension of the Student of January 24, 2001. At the meeting, the Social Worker, Whittier found out that the Student would not be returning to Whittier school. (Tr. 1382, D.E. 118 P. 3) The District did not take the position that the Student would not be allowed to be readmitted to Whittier and the Social Worker, Whittier anticipated that the Student would return on Monday January 29, 2001 to school. (Tr. 1380-1381)

214. With regards to the Parent's request for ESY services, the Social School Worker, Whittier sent a memo to the Parent dated January 21, 2001. In the memo, the witness notified the Parent that based on a telephone call to Ann Gunn-Smith, that any decision regarding ESY had to be a Whittier team decision, with appropriate data, and that the topic of ESY services would be added to the February 14, 2001 IEP meeting agenda. (D.E. 119)

215. In a telephone contact with the Parent on January 23, 2001, the Parent asked for a Behavior Intervention

Plan (BIP) she wanted to know the criteria for the Student to come out of time-out. The Parent was concerned. (r. 1390, D.E. 120) Parent also mentioned she wanted a BIP from the Special Education Teacher, Whittier by phone on January 19, 2001. (D.E. 128) The Special Education Teacher, Whittier responded that she had 10 days to write the plan and needed to get to know the Student before she completed it. (Tr. 2166)

216. A Behavior Intervention Plan for the Student was provided to the Student by mail on February 2, 2001. (Tr. 1397, P.E.C – 4) The BIP was never signed or returned by the Parent. (Tr. 1441). Kristi Ward, SPEN teacher, wrote the BIP. (Tr. 1441)

217. A Notice of Team Meeting was sent to the Parent on February 20, 2001 for a meeting to be held on March 2, 2001. An IEP meeting was held on that date. (D.E. 124) Persons attending the March 2, 2001 IEP meeting included Ann Gunn-Smith, Monitoring and Compliance Specialist; Parent; Parent counsel; Bobbie Evans, Mental Health Service Coordinator; District counsel; Kristi Ward, SPEN teacher at Whittier; Tammy Goetz, Assistant Principal; Sue Poston, Principal; Don Allen, Assistant Director of Special

Education; Rebecca Ruddle, School Psychologist – Whtittier; Nancy Bradefort, OT – Whittier; and Linda Azure, School Social Worker, Whittier. (P.E. C – 2) A set of draft goals were presented at the meeting. (P.E.C –3)

218. According to the testimony of the School Social Worker, Whitteir, the Student attended Whittier school for seven partial days and was in locked seclusion four of the seven days. (Tr. 1477)

219. The day that the Student came to school at Whittier Elementary school, there was a staff member in the classroom for him that had been reassigned from another classroom. This person was Yvette Whitelow. (Tr. 494)

220. The Social Worker, Whittier testified that she found the Parent o be a concerned Parent that was respectful. (Tr. 1504)

221. Kristina Ward, (hereafter, Special Education Teacher, Whittier) is a special education teacher at Whittier Community School for the Arts (Whittier school). Special Education Teacher, Whittier is a licensed teacher of Students with emotional / behavioral disorders (EDB). (Tr. 15939 – 1540) Special Education Teacher, Whittier first met the Parent when

she and Parent counsel were touring Whittier school. Tr. (1549 – 1550)

222. The Student's first day of class at Whittier school was January 16, 2001. (Tr. 1553)

223. It was made clear at the January 9, 2001 team meeting that the Whittier SPEN program utilized a seclusion locked time-out room. (tr. 1566) During the team meeting, Special Education Teacher, Whittier explained her process of when and how students get time-outs. She explained the process of when and how the program utilized restraint and explained that restraint and locked out-time was the last source that were used in the program. (Tr. 1568-1569)

224. The Special Education Teacher, Whittier testified that there was discussion of the use of sensory integration or calming techniques at the meeting but suggested in testimony that she did not say much in that conversation as "I, as an EBD teacher, have never incorporated those tactics. Usually that's left for the occupational therapists." (Tr. 1569)

225. During the time the Student was in the classroom of Special Education Teacher, Whittier, the teacher and the Parent had daily communication thought phone calls, visits and in writing. (Tr. 2159) Time-out sheets

were faxed to the Parent and point sheets were sent home and the Parent would singed and returned. (Tr, 2161)

226. At the request of the Parent, the amount of homework was reduced while the Student was at Whittier. (Tr. 2174)

227. Special Education Teacher, Whittier's classroom was set up on a point system such that the Student's could earn rewards. Behavior is carefully monitored and charted. (Tr. 2180, D.E. 129, 131)

228. Dr. Lawrence Foley, (hereafter, Clinical Psychologist, Washburn Child Guidance Center) has a Dr. of Psychology from Chicago School of Professional Psychology. (Tr. 1603) Has been employed at Washburn Child Guidance Center since November 1995. He currently works part-time in the Elementary Day Treatment Program where he supervises and provides clinical consultation to staff. (Tr. 1600 – 1601)

229. Washburn Child Guidance Center is a day treatment facility. It is a half0time program, which runs from 1:00 till 4:00 p. m. It is operated in collaboration with the District. The facility has a capacity for 12 children.

(Tr. 1607-1608) Washburn Child Guidance does not receive referrals from other school districts. (Tr. 1608) the program has three components: (a) an academic session, (b) recreational session, and (c) group therapy. (Tr. 1689 – 1690) The program operates four days per week. (Tr. 1694) The fundamental purpose of the day treatment program is to help address the emotional and behavioral needs of the children who are in the program so that they can function as successfully as possible in their regular public school setting in the least restrictive environment. (Tr. 1696) Collaboration with the child's regular public school is a portion of the program. (Tr. 1696)

230. Washburn Child Guidance Center recommended a full day treatment setting for the Student. (Tr. 1639) This recommendation was made in a meeting between the Parent, Day Treatment Therapist, Clinical Psychologist, Washburn Child Guidance and Bobbie Evans, the Mental Health Service Coordinator. The recommendation was not made at an IEP meeting. (Tr. 1751).

231. Based on a review of documents, Clinical Psychologist, Washburn Child Guidance Center noted that there appeared to be a financial relationship

between the county, the District and Washburn. (Tr. 1648)

232. During his time as a client of Washburn Child Guidance Center, the Student was in two difference day treatment programs. First, he was in the Preschool day Treatment Program. Student was in the Elementary Day Treatment Program since June 2000. (Tr. 1654) According to the testimony of the Clinical Physiologist, Washburn Child Guidance, the Student made variable progress during his time in the Elementary day Treatment Program. Student has been in three District schools during his time in the Elementary Day Treatment Program. (Tr. 1655-1656)

233. Clinical Psychologist, Washburn Child Guidance had no reason to believe that the Parent was anything less than candid and forthright in her interactions. (Tr. 1657) He also testified that the service outcomes for the Student at Washburn Child Guidance were not successful. (Tr. 1664)

234. Thomas Steinmetz, (hereafter, Day Treatment Therapist) became the Director of Program Management at Washburn Child Guidance Center in February 2001. Prior to that date, he was a therapist in

the Elementary Day Treatment Program and the program manger of that program. (Tr. 1678) He started employment with Washburn Child Guidance Center in January 1996. (Tr. 1681)

235. Day Treatment Therapist's first experience working with the Student was as an outreach consultant in November 1996. (Tr. 1683) The purpose of the outreach consultation is to provide consultation to child-care centers. He observed the Student at Park View Montessori Elementary School. (D.E. 15) it is unusual to provide consultation to a public school. (Tr. 1684) Among the recommendations made in on March 11, 1998 in a letter to Park View Staff was that manual and sensory activities seen to be organizing and calming for the Student. Activities with sand, water, dirt, playdough, etc. seemed to help Student calm down. (D.E. 15)

236. The next time the witness provided treatment to the Student was when the Student entered the day treatment program in June of 2000. (Tr. 1685) From June 2000 forward, the Day Treatment Therapist attended at last four IEP meetings regarding the Student. Two of these meetings were at Whittier and two meetings were at Keewaydin. (Tr. 1687) At these meetings, the witness would provide information about what was working at day treatment and what wasn't

working. Input varied from meeting to meeting. (Tr. 1710)

237. The Day Treatment Therapist testified that the severity of the Student's behaviors had increased between the description on the Student in his March 11, 1998 letter (D.E. 15) and his time in Elementary Day Treatment. (Tr. 1693)

238. Day Treatment Therapist testified that the Student was making progress in the day treatment program in that the frequency of aggression and destructive outbursts has decreased. (Tr. 1700)

239. The Student was in the Elementary Day Treatment Program from June of 2000 until lake January of 2001. At that time, Day Treatment Therapist was scheduled to attend an IEP meeting at Whittier school. When the witness arrived he was given a letter from the Parent revoking the consent for anyone from Washburn Child Guidance Center to have communication with the District. This revoking of consent was effective immediately so he was asked to leave the meeting. (Tr. 1702)

240. Day Treatment Therapist noted that the District provides financial support to Washburn Day

Treatment Center by providing bus services for students attending the Elementary Day Treatment Program. (Tr. 1716)

241. During the time Student was at Keewaydin and Whittier school, Day Treatment Therapist testified he was in contact with someone at the school once or twice a week. (Tr. 1721) The witness testified that the District has required information regarding interventions used and the success of those interventions at Washburn. (Tr. 1750)

242. Day Treatment Therapist testified that the Parent had been candid and forthcoming in sharing information and was willing to share information from various service providers until the Parent revoked consent to communicate with the District. (1724-1725) The witness testified that he believed the Parent wanted communication between the District and Washburn to go though her rather than the District and Washburn communicating directly. (Tr. 1733)

243. It was the opinion of the Day Treatment Therapist that the Student would have the same type of adjustment difficulties starting in a new setting that he had a previous setting. Specifically, difficulties following direction at times and some of the aggressive and destructive behavior. (Tr. 1737)

244. Don Generaux, (hereafter, Principal Keewaydin) has been a principal since April 1996. Prior to being a principal, Principal Keewaydin was a school social worker for Setting III special education school based program at Henry SPEN. (Tr. 1822, 1824)

245. Principal Keewaydin was on leave from his position as principal for health reasons from late August until returning to work on October 19, 2001. (Tr. 1828) Art Ladoduk was interim principal during Principal Keewaydin's medical leave. (Tr. 1828) As a result of surgery, Principal Keewaydin had a 20-pund weight restriction for lifting or carrying upon his return from medical leave. (Tr. 1833)

246. Principal Keewaydin testified tat Keewaydin School does not have a separate time-out room or locked quiet room. Time-outs are essentially given to the students in the classroom and sometimes in the principal's office or bench outside the office. ((Tr. 1832)

247. Principal Keewaydin testified that after his return from medical leave it was suggested that one option for disciplining the Student should be removal to the principal's office if he was misbehaving. This did not

work well. First, the Principal Keewaydin had a weight restriction. Second, the Student was hard to control and he would be into desk and materials in the office. There was a concern for the safety of the Student. (Tr. 1834-1835)

248. Principal Keewaydin became aware that the Parent was not satisfied with the educational program when he received a copy of a letter from the Parent requesting on outside evaluation. (Tr. 1839, D.E. 73) Principal Keewaydin testified he called Don Allen, Director of special education / EBD to get him involved. (Tr. 1841)

249. Principal Keewaydin testified he attended a team meeting which was attended by large number of persons including Elana Schroeder, special education teacher, Keewaydin; Kathy Thompson, school social worker; Lucy Maloney, OT Keewaydin; Sherrie Lindnorg, School Psychologist, Keewaydin; Dr. Allen, Director of special education EBD; Parent, and Bobbie Evans. ((Tr. 1843 – 1843) At that meeting the team discussed (a) outside assessment, (b) student behavior, (c) whether Keewaydin was the appropriate place for the Student considering that there was no time-out room (Tr. 1842) At this meeting, a decision was made to call the police if the Student's behavior was out of

control for an extended period of time. Principal Keewaydin stated the purpose of calling the police was to held de-escalate the Student's behavior. (Tr. 1846-1847) Principal Keewaydin testified that at this meeting, much discussion was centered on giving the Student one last chance in Elena Schroeder's classroom. (Tr. 1862)

250. In December 2000 the Student kicked and hit a staff member and was suspended for two days. (Tr. 1849 – 1850)

251. Principal Keewaydin testified that he though the Student had made educational progress while a student at Keewaydin School. To support this, Principal Keewaydin referenced a "walk with the Principal" in November 2000. (Tr. 1836-1837, 1850 – 1852) Principal Keewaydin also used anecdotal information to support the Student's educational progress including (a) looking in the classroom, and (b) special education team meeting reports. (Tr. 1870 – 1871) He did not review any data generated by Ms. Schroeder in the classroom. (Tr. 1871-1872)

252. Principal Keewaydin testified that the Parent was an active participant in all special education meetings regarding the Student. Parent was provided due process rights. Parent had outside agencies working

with the Student and involved in team meetings. The school never discouraged the participation of Ms. Nygren. (Tr. 1859)

253. Dr. Don Allen, Assistant Director of Special Education for the District (hereafter, Assistant director of Special Education) is the supervision of programs for students with emotional / behavioral disorders and mental impairments for the District. (Tr. 1892) Dr. Allen had a doctoral degree in school psychology. (Tr. 1899)

254. Assistant Director of Special Education first learned about the Student when the Parent wrote a letter regarding an assessment at Keewaydin School and the Parents request. (Tr. 1902-1903, D.E. 73) Assistant Director of Special Education called Principal Keewaydin and told him to set up an IEP meeting. This IEP meeting occurred on November 14, 2000. (Tr. 1903 – 1905) D, E, 81) At the November, 2000 team meeting, Assistant Director of Special Education testified the team the discussed frontal lesions of the Student and concluded that there was no clear, definitive assessment results indicating the Student's behavior was related to this problem. (Tr. 1934 – 1935)

255. Assistant Director of Special Education testified that the District informed the Parent of parental tights and considered parental input when designing the IEP for the Student. (Tr. 1922-1924)

256. On March 2, 2001 the Assistant Director of Special Education attended the IEP meeting regarding the Student. At this IEP meeting, the Assistant Director of Special Education testified that the team discussed a behavior plan for the Student, and conditional discipline procedures for the Student. (Tr. 1941 – 1944) In addition the team discussed goals and objectives. The District provided the Parent with a proposed IEP on that date. (H.O. Ex. Black 4)

257. In reviewing the results of the Dr. Richard Ziegler, Independent Evaluator One, the Assistant Director of Special Education (a) agreed with the independent evaluators recommendations that (a) Student's behavior needs to be managed and can be managed effectively with intense behavior modification, and (b) Student should be placed in a setting whereby he receives one-to-one instruction, (Tr. 1952-1953, D.E. 142)

258. Assistant Director of Special Education testified his understanding of the problem at Keewaydin School

was the high-intensity type of tantrum or explosive behavior that required restraint. According to the Assistant Director of Special Education, this could involve restraint. It could go an hour. (Tr. 1954-1955)

259. Assistant Director of Special Education testified that given his experience at Keewaydin and Whittier schools, a more intense program, which is more secluded and intense, would be in order. This witness testified that Crawford school would be an appropriate placement for the Student. Crawford is a Setting Four school, while Keewaydin and Whittier are Setting Three schools. Crawford is a more intense program with a better staff ratio, and more specific support services. This program received consultative services from a psychiatrist and from other mental health people. (Tr. 1958-1959) This program was also considered for the Student in November 2000. (Tr. 1959) The Assistant Director of Special Education testified that the Parent (in November 2000) was concerned about the number of times the Student has been moved from program to program and wanted the Student to stay in Keewaydin to maintain some consistency. (Tr. 1960)

260. Dr. Allen considers Setting Four placement to be the least restrictive for the Student at this time. (Tr. 1962)

The March 2, 2001 IEP submitted by the District identifies the Federal Setting proposed by the District as "Feral Setting IV" which is a Public Separate Day School setting. Crawford is an example of one such settings. (Tr. 1972-1973, H.O. Ex. Black 4) Crawford school was not discussed as a potential or proposed placement for the Student during the March 2, 2001 IEP meeting. (Tr. 2013m H.O. Ex 2-13) There was no representative from Crawford present at the March 2, 2001 IEP meeting. (Tr. 2061) Kristi Ward, the special education teacher, wrote the Behavioral Intervention Plan (BIP) that was attached as a portion of the proposed IEP from Whittier School. The proposed IEP identified the case manager as Kristi Ward, of Whittier school. The school identified on the BIP was Whittier school. (tr. 2059 – 2060, H.O. Ex. Black 4)

261. Assistant Director of Special Education testified that he believed that the Student could receive educational benefit from attending Calvin Academy. (Tr. 1967) However, that was not the only setting where he could receive educational benefit. (Tr. 1967)

262. Assistant Director of Special Education testified that the District is currently under corrective action with respect to its policies and procedures for failure to discuss and decide extended year services for students

with disabilities. (Tr. 1980) According to testimony, extensive training has been ordered and the training is to include that ESY has to be discussed at each child's annual IEP meeting. (Tr. 1982 – 1983) The District has been cited for policy of limiting the consideration of ESY to an overly narrow standard of regression and recoupment and a failure to consider the self-sufficiency standard. (Tr. 1986, P.E,K – 18) The complaint decision concluded that the District was in violation of state rule and federal law by requiring an IEP team independently determine ESY services for eligibility of students for ESY and limiting the standards. (Tr. 1988, P.E.K –18) In the Corrective Action Plan for the District dated November 11, 2000, one action needed as identified was stated as follows: "ESY services must be considered for every student at each initial annual IEP team meeting. (P.E.K – 22)

263. The IEP proposed on March 2, 2001 does not agree or disagree to ESY services. Instead, the documents states that more data is needed and the team will reconvene to discuss the need to ESY by May, 2001. (H.O. Ex. 4 Black)

264. In the proposed IEP on March 2, 2001 the District did not identify the location of the services to be provided to Student. The District only identified the Feral Setting. (Tr. 2008) In the Corrective Action Plan for

the District, dated November 11, 2000, one action needed as identified was stated as follows: "Each IEP must include services provided, starting dates, duration of frequency of location of services in general education and special education settings" (Tr. 2007, P.E. Ex. K – 22A p. 5) The location of the proposed program or building is not identified in the March 2, 2001 District proposed IEP as required by the Corrective Action Plan. (Tr. 2008, H. O. Ex. Black 4, P.E. K – 22A p. 5)

265. Assistant Director of Special Education testified that it is not sufficient to just check the box for federal setting and that a location of services was needed. (Tr. 2009)

266. On February 7, 2001 this hearing officer ordered that an IEP meeting be held on or before March 2, 2001 between the parties and that the District submit the final proposed District IEP by fax to the hearing officer and the Parent no later than 5:00 p.m. on that date. (H.O. Ex 73)

267. Student stopped attending Keewaydin on December 6, 2000. He returned to Whittier on January 16, 2001. The District was aware that ESY was an issue on December 8, 2001. Still, on March 2, 2001 no decision

was made in the District's final proposed IEP of agreement or disagreement to ESY services. Instead, the District maintained that they needed more data. (H.O. Ex. Black 4)

268. A draft of goals and objectives were prepared for the March 2, 2001 IEP and presented by Kristi Ward. (D.E. 126) The March 2, 2001 IEP included goals in academics, behavior and occupational therapy. (Tr. 2233, H.O. Ex. Black 4) Special Education Teacher, Whittier does not remember any discussion of OT services to be offered the Student at the March 2, 2001 IEP meeting. (Tr. 2244) Special Education Teacher, Whittier does not remember any discussion about the configuration of service minutes to be provided to Student in the proposed March 2, 2001 IEP. (Tr. 2244) Special Education Teacher, Whittier testified that Assistant Director of Special Education determined the placement for the Student in a more restrictive environment after the IEP meeting. (Tr. 2244-2245) The proposed location of the Student's educational program was not identified on March 2, 2001. (Tr. 2246)

269. Special Education Teacher, Whittier testified that the Parent suggested a number of strategies to be employed to avoid escalating behavior at teach meeting that she attended. (tr. 2253-2254) Special

Education Teacher, Whittier did not use sensory integration claiming techniques because they were not part of the Student's current program. (Tr. 2254-2255)

270. Special Education Teacher, Whittier testified that Mr. Steinmetz of Washburn Child Guidance Center indicated that the use of restraint with the Student was likely to escalate his behavior at the January 9, 2001 team meeting. (Tr. 2298)

271. An educational assistant was assigned to the Student to work with him starting on his first day of school at Whittier. (Tr. 2298)

272. Special Education Teacher, Whittier testified that among the antecedent behaviors that lead to escalating behaviors discussed at the January 9, 2001 team were (a) complaining of headaches, (b) refusing to work and (c) putting his head down on his desk. (Tr. 2307)

273. The Parent served a request for due process on the District on December 8, 2000. (H.O. Ex. 4) On December, 20, 2000 Dr. Robert Miller was appointed by the Commissioner of Education to conduct his due process hearing. (H.O. Ex 1)

274. A prehearing conference was held in this matter on December 22, 2000. At that time, it was decided the Student must stay in the "Stay Put" placement (Keewaydin) during the pendency of administrative hearing or the District had agreed to provide the "Stay Put" placement at Whittier School if the Parent so chose. (H.O. Ex. 14) The Parent registered concern that the Student might be "a danger to himself or others or to the safety of the school environment" and the Hearing Officer explicitly informed that parties that he wished to be informed if any issues of "safety to self or others" were forthcoming. (H.O. Ex. 14)

275. On January 4, 2001 this Hearing Officer ordered an Independent Educational Evaluation (IEE) in this matter. The Parent requested a Functional Behavior Assessment (FBA) and an Occupational Therapy (OT) assessment on October 11, 2000 and also requested an independent neuropsychological evaluation of the Student on December 8, 2000. The District did not respond in a timely manner as required by Federal Law and the Hearing Officer ordered these three components of an IEE including FBA, OT assessment and independent neuropsychological evaluation on this date. (H.O. Ex. 20)

276. Todd Mulvehill is Dean of Students and Behavior Counselor at Calvin Academy, (hereafter, Dean of Students, Calvin Academy) testified that Calvin Academy provides one-to-one instruction for six hours under an education program individualized for each student and serves a wide range of students with and without disabilities. (Tr. 2685 – 2686)

277. Dear of Students, Calvin Academy testified about the development of the Student's individualized education program after his enrollment at Calvin Academy and the Student's current program. (Tr. 2689-2714)

278. Dean of Students, Calvin Academy has consulted with Omar Othman and Rebecca Catterton, Independent Evaluators. (Tr. 2691) Educational program for the Student was developed based on the collection of baseline data and review of records. (Tr. 29693-2697)

279. Dean of Students, Calvin Academy testified that Student is provided sensory activities at Calvin Academy and is transported twice per week for OT services at the University of Minnesota (Tr. 2710 0 2714)

280. Dean of Students, Calvin Academy testified that Calvin Academy has not had to use any restraint with the Student over the past two weeks. (Tr. 2716)

281. Dean of Students, Calvin Academy testified about the Calvin Academy summer program. (2679-2685)

282. Susan Bigsby-Johnson is Head Master of Calvin Academy (hereafter, Head Master, Calvin Academy) testified about the educational programming at Calvin Academy. (Tr. 2821-2822) Head Master, Calvin Academy has un undergraduate degree in educational administration, a licensure in emotional behavior disorders, a provisional certificate in Mild to Moderate Mental Impairments, and is working toward a director of special education license. (H.O. Ex. 2-16)

283. Head Master, Calvin Academy testified that 50 % of the Students at Calvin Academy are students with special education needs and remaining 50% are non-identified students that are at risk. (Tr. 2821)

284. Based on interview with Parent and Student and review of records, an emotional plan was developed for the Student. (Tr. 2825) The review of records included an OT report, psychologist's observations and recommendations, a functional behavior analysis,

the neuropsychological evaluation completed by Dr. Richard Ziegler from Fairview, and an IEP from the District. (Tr. 2827)

285. Head Master, Calvin Academy testified about development and implementation of the educational program at Calvin Academy. (Tr. 2825-2829) Head Master, Calvin Academy testified about the Student's current educational program at Calvin Academy. (Tr. 2829 –2838) Head Master, Calvin Academy testified about the Student's progress at Calivn Academy. (Tr. 2838-2741)

286. Head Master, Calvin Academy testified that Student has not been put in locked seclusion while at Calvin Academy and the use of short-term restraints with him has reduced. (Tr. 2841 – 2842)

287. Hear Master, Calvin Academy testified that the police have not been called to Calvin Academy to control the Student's behavior. (Tr. 2842-2843)

288. Parent testified that she visited Crawford School and that Crawford staff told her that they do not have mental health services available for students here. (Tr. 3045-3046)

289. Parent testified about the summer program at Calvin Academy and that it would be appropriate for Student for Summer of 2001 (tr. 3038-3039)

290. Parent testified that the Student has made progress at Calvin Academy since enrolling there and there has been a decrease in the use of quite room, fewer behaviors at home, increase interest in learning, friends and school. (Tr. 3037-3038)

Based on the forgoing Findings of Fact, the hearing officer makes the following:

CONCLUSIONS

1. The Commissioner of the Department of Children, Families and Learning and the hearing officer had jurisdiction in this matter pursuant to Minn. Stat. 125A 09 and Minn. Rule 3525.4400.
2. The Student and Parent reside within the geographic bonds of Special School District #1. As such, SSD # 1 has the primary responsibility of educating the Student under Minnesota and Federal law.
3. Minnesota Stat. 125.09 Subd. 6 provides in part, that parents, guardians and the districts must have an opportunity to obtain an impartial due process hearing initiated and conducted by and in the district

responsible for assuring that an appropriate program is provided in accordance with state board rules, if the parent or guardian continues to object to:

(A)a proposed formal assessment or proposed denial of a formal assessment.

(B)Proposed placement or transfer of child to special Educational placement.

(C)Proposed denial of placement of child in special education.

(D)Proposed provision or additional special education services for the child.

(E)Proposed denial or removal of special education services for their child.

4. The hearing officer shall reside over and conduct the hearing and shall rule on procedural and evidentiary matters, and the hearing office's decision shall be based solely upon the evidence introduced and received into the record. One purpose of the haring is to develop evidence of specific facts concerning the educational needs, current educational performance, or apparent disabilities of the person as it relates to the need for proposed action. (Minn. Rules 3525.4300)
5. The burden of proof is on the district to show by a preponderance of the evidence that its actions have been appropriate.

6. The notice of hearing in this matter was proper in form and content, and the district has complied with all relevant substantive and procedural requirements of statue and rule.
7. Under Minn. Rules 3525.4200 any part to the hearing may prohibit the introduction of any evidence that has not been disclosed to the party at lease five days before the hearing.
8. This decision has not been rendered within 45 calendar days from the date of receipt of parent's request for haring for the purposes of Minn. Stat. 125A.09. Continuance was requested and granted due in this matter.

Procedural Safeguards

9. By the preponderance of the evidence the District demonstrated that the Parent was afforded parental rights and full participation as an IEP team member as require by the IDEA.
   (a) The record clearly indicates that the Parent aware of and participated in IEP meetings team meetings, etc., during the timeframe at hearing. The record also indicates that the Parent attended these meetings and brought wither many externals, outside agency experts, as is her right. The Parent stipulated during the

hearing that she has received notice of procedural safeguards on numerous occasions. (F. 83) She also received a notice of meetings as appropriate. The standard of participation is not agreement between the parties. The standard of meeting the procedural safeguard requirements is found in 20 U.S.C. 1415. The District met his standard for participation and procedural safeguards. (F. 10, 11, 18, 53, 54, 55, 56, 59, 60, 62, 63, 64, 65, 69, 70, 71, 75, 80, 83, 161, 175, 184, 193, 199, 208, 212, 217, 252) IDEA does not require the District to be held to a standard of agreement with the Parent position in order to afford full participation. With that stated, the record is clear that the Parent received appropriate notice and was given the opportunity to participate. Any errors in provision of procedural safeguard were de minimus.

10. By the preponderance of the evidence, the District demonstrate that the District adequately evaluated the Student's needs for special education and related services as required by the IDEA 20 U.SC. 1412(a)(3) and (7), and 1414(a)(2), (b) and (c).

The record reflects no inappropriate use of tests in the identification of the Student. 20 U.S.C. 1414 (a)(2), (b) and (c). Student was identified in his kindergarten year for EBD services within the District and the record does not reflected that earlier identification was warranted. 20 U.S.C. 1412(a)(3) and (7)

Educational Program: Academic Year Program – February 1998 to June, 2000.

11. By the preponderance of the evidence, the District demonstrated that the Student was provided an Individualized Educational Program (IEP) designed to meet his unique educational needs and was designed to confer meaningful educational benefit to the Student or to provide him with a free and appropriate public education as required by the IDEA and Minnesota state law from February, 1998 to June, 2000.

Student became a resident of the District in February 1998. (F.9) He was diagnosed as a student with emotional behavior disorders in June 1998. (F. 11) The student received behavior assistance from regular education pre-referral interventions before he was found

eligible for special education. (F. 14) In the first half of first grad the Student's behavior deteriorated. (F. 16) In the second half of the year his behavior dramatically improved. (. 17) Parent testified the Student received educational benefit in second half of first-grade. (F. 20) In fall of Student's second grade year, the Student's treating psychiatrist recommended withdrawing the Student from school because of deteriorating behavior at home and in the community. (F. 34, 35) January 2000 Student was admitted to F-UMC Mental Health. (F. 37) School worked with Parent to find an appropriate program when he was out of hospital. (38, 39) Student attended Marcy Open School in March, April, and May 2000. (48)

The District's Educational Program: Academic Year Program-June 2000-Present Did Not Provide Educational Benefit or FAPE

12. The District provided the Student with an Individualized Educational Program (IEP) designed to meet his unique educational needs and thereby failed to confer meaningful educational benefit to the Student or to provide him with a free and appropriate

public education as required by the IDEA and Minnesota state law.

The evidence at hearing established that the Student's program from placement in Keewaydin School forward (August/September, 2000) was not appropriate and resulted in the failure of the Student's educational program. The Student's IEP team failed to undertake any analysis of the relationship between the Student's behavior and disciplinary exclusions. The Student was trapped in an increasingly punitive approach to disciplining, which resulted in increasing levels of isolation, time-out and locked seclusion for the Student. (F. 72, 80, 87, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 123, 124, 125, 126, 128, 131, 132, 133, 147, 148) No meaningful review of the Student's IEP was undertaken. The failure of a district to formulize a plan for addressing the misconduct caused by a student's disability compounds the denial of FAPE. A behavior management plan is punitive in nature where it does not teach the student appropriate behaviors in a positive matter. *Mason City Community Sch. Dist.* 32 IDELR 216 (SEA IA 2000)

Past evaluation results and the success of past behavior management methods and strategies were ignored over the objection of the Parent. (F. 13, 17, 24, 25, 26, 27, 28, 29, 158, 159, 167, 171, 176, 188, 201, 201, 207, 208,

249) Even when faced With clear evidence that the behavior plan was not successful, the District remained unyielding and inflexible in it's approach to the Student's educational needs and behavior needs. At both Keewaydin and Whittier, the Student was expected to fit into the program and the program was not adjusted to meet the needs of the Student.

> The educational program provided the Student from Keewaydin and Whittier forward do not meet the standard established by the Supreme Court in Board of Education of Hendrick Hudson Cent.. Sch. Dist. V. Rowley, 458 U.S. 176, 206-07 (1982). Educational benefit was de minimus for the Student's educational programs at both Keewaydin and Whittier. As a result of significant and extensive substantive e violations of his rights, the Student did not receive services sufficient to confer meaningful benefit and provide him with a free appropriate pubic education as required by the IDEA at Keewaydin and Whittier Schools. 20 U.S.C. 1412 (a)(1). (F. 87, 104, 105, 117, 127, 145, 146, 148, 167, 224.)

Specifically,

A. The District failed to ensure that Student's IEP team developed, reviewed, and revised his

education programs to meet his needs as required by the IDEA, 20 U.S.C. 1412(a)(4), 1414(d)(1)(A), and 1414(d)(4).

B. The District failed to ;ensure that, in developing Student's IEP's, the IEP team considered appropriate strategies, including positive behavioral interventions, strategies, and supports to address his impeding behaviors, as required by the IDEA, 20 U.S.C. 1414(d)(3)(B).

C. The District failed to develop behavioral interventions so that the Student could acquire appropriate behaviors and skills to enable him to function as independently as possible, as required by Minn.R. 3525.850.

D. The District failed to provide an atmosphere that was conducive to learning and that met Student's special physical, sensory and emotional needs, as required by Minn. R. 3525.1400.

E. The District failed to consistently convene Student's IEP team and adequately assess the appropriateness of his IEP, the need for additional assessment, or amendments to his IEP when conditional procedures were used in

emergency situations twice in a month or when his pattern of behavior emerged

That interfered with his educational success, as required by Minn. R. 3525.2900. subp. 5 (c)

F. As a result, Student has not received services sufficient to confer meaningful benefit and provide him with a free appropriate public education as required by the IDEA, U.S.C. 1412(a)(1). In addition, the District has denied Student a free appropriate public education in the least restrictive environment in violation of corollary state law and its implementing rules. Minn. R. 3525

13. By the preponderance of the evidence, the District demonstrate that it considered, utilized, coordinated with, or implemented the services and recommendations of various public agencies and service providers as required by the IDEA.

There is a clear and substantial record of interagency collaboration between the District and various adult providers. Clearly, there is ongoing communication between the District and staff from Washburn Guidance Center. (F. 49, 69, 71, 241) Second, adult providers were invited to team meetings at the request of the Parent or

District. (F 29, 55, 59, 64, 69, 71, 193,217. Third, the record indicated that District staff exchanged information as appropriate and with appropriate releases of information.

Extended School Year Services (ESY)

14. Minnesota Rule 3525.2900 G (1) – (3) requires districts to consider an extended school year for a pupil when it is determined:

(1) that the pupil will experience "significant regression" in the absence of an educational program;

(2) the time required to relearn the skills lost is excessive; or

(3) the effects of the breaks in programming are such to prevent the student from attaining the state of self-sufficiency that the student would otherwise reasonably be expected to reach.

The amount and type of service for summer must be appropriate to maintain performance on IEP goals.

15. In *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 32 Ed. Law Rep 445 (5th Cir. 1986), the Fifth Circuit court of Appeals held that ESY is required if the benefits accrued during the school year would be significantly jeopardized as a result of the absence of a summer program.

16. In *Johnson v. Independent School District No. 4 of Bixby,* 921, F.2nd 1022 (10th Cir. 1990), the appellate court noted that the regression-recoupment analysis was not the only measure used to determine the necessity of a structured summer program. In addition to the degree of regression and time to recoup skills, courts have considered many factors important in their discussions of what constitutes an appropriate educational program. These have included: the degree of impairment, resources of the child's parents to provide the educational structure at home, whether the service is extraordinary to the child's condition, and the child's rate of progress. The analysis should also include the opinions of professionals in consultation with the child's parents as well as retrospective data such as past regression and rates of recoupment of skills. *Cordrey v. Euckert,* 917 F. 2d 1460, 63 Ed. Law Rep. 798 (6th Cir. 1990) also references consideration of "emerging skills" in determination of ESY.

A. The District has not demonstrated by a preponderance of the evidence that the Student was adequately assessed for participation or notified of the possibility of participation in the ESY program for summers of 1998, 1999, 2000 or 2001 (Proposed IEP of March 2, 2001). As a result, the District has failed to properly plan, provide and implement an ESY program specifically tailored to meet the needs of the Student. No evidence was provided in hearing by the District that ESY eligibility for services was discussed prior to the 2000-2001 school year. No evidence was provided at hearing by the District that the Parent was provided notice of the potential eligibility of the Student for ESY services or the availability of ESY services. Without knowledge of the criteria and the procedure to request ESY services, it is unreasonable to expect the Parent to request ESY service. The record reflects that the District failed to demonstrate that they informed, considered or offered ESY to the Student. (F. 11, 12, 18, 21,22, 43, 46, 53, 57, 74, 205, 214, 262, 263, 267, 277, 285) While the IDEA provides that claims for reimbursement of unilateral private school tuition may be reduced or denied if specific notice of dissatisfaction and intent to enroll is not provided, 20 U.S.C. 14122(a)(10)(C)(iii), there are exceptions to this rule. In this matter, I believe the District did not provide the parent with information regarding ESY so the Parent

was unable to request ESY service. This is tantamount to "the school preventing parent from providing such notice". 20 U.S.C. 1412(a)(10)(iv)(II) and (III).

18. This Student has very complex education and behavioral needs and the District has struggled to meet those complex needs. The record reflects that the educational program forward (a) should provide one-to-one instructions by a licensed teacher. (F. 95, 96, 150, 166), (b) the program should be intense. (F. 127), (c) should include occupation therapy programming to address Student's sensory integration dysfunction. (F. 158, 159, 166, 167) (d) have access to regular education peers. (F. 166) and (e) is a gentle and proactive program. (F. 166)

19. Calvin Academy is the appropriate placement for the Student. (F. 129, 261, 276, 278, 279, 280, 283, 286, 288, 290) IDEA and state law clearly express a preference for education in the mainstream setting to the maximum extent appropriate, with removals to more restrictive setting only when necessary to appropriately serve the child. 20 U.S. 1412(a)(5); Minn. Stat. 125.08(a)(5). The record demonstrates that Student has been served in a self-constrained special education setting in the District since September 2000, with extremely limited, non-academic mainstream

opportunities. The record demonstrates that the District currently proposes to serve the Student in a segregated separate school with no opportunity for contact with non-disabled peers at Crawford Elementary. The proposed District IEP of March 2, 2001 (H.O. Ex. Black 4) mainstream a very similar behavior management plan to that utilized in Whittier Elementary and the behavior plan proposed by the District are not appropriate.

20. Calvin Academy serves disabled and non-disabled students and provides for a variety of daily opportunities for contact between those students. Calvin Academy is, therefore, less restrictive than Crawford.

21. If a school district fails to offer an appropriate educational placement to a child with a disability, the district may be required to reimburse parents for a private school placement. *Florence County School District Four v. Carter*, 114 S. Ct. 361 (1993); *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985). The Supreme Court has recognized the right to reimbursement for unilateral placement by parents, when it is determined that the public school's program is inappropriate, and the program offered at the unilateral placement if found to be appropriate for the

child. *Burlington, supra.* Reimbursement is an equitable remedy, and the private school is not required to meet the standards of the public schools in order to be deemed appropriate. *Richardson Independent School Dist.*, 21 IDELR 333, 337 (1994) (*citing Florence County School District v. Carter*, 114 s Ct. 361 (1993); *Alamo Hgts. Independent School Dist. v. State Board of Education*, 790 F. 2d 476, 1153, 1161 (5th Cir. 1986). The educational placement at Keewaydin and Whittier did not provide FAPE or confer education benefit. Therefore, unilateral placement of the Student at Calvin Academy was warranted.

22. Placement is a proper issue for decision by a hearing officer. *See Oberti, v. Bd. of Ed. Of Clementon School District,* 19 IDELR 908 (3d. Circ. 1993) A hearing officer may properly order future placement. Chattahoochee County Bd. Of Educ. V. Tremaine S., 1986-1987 EHLR Dec. 508:295 (Ga. 1987). The Act contemplates that special education will be provided where possible in regular schools...but the Act also provides for placement in private schools at public expense where this is not possible. *Dept. of Ed. Hawaii v. Katherine D.*, 1983-84 EHRL Cec. 555:276 (9th Cir. 1984) also see Minn. R. 3525.0800.

23. The Parent provided notice in writing of intent to enroll at a private school at public expense on February 19, 2001 prior to the enrollment at Calvin Academy.

Based upon the foregoing Conclusion, the Independent Hearing Officer makes the following:

DECISION

1. The Student was denied FAPE and meaningful educational benefit from September, 2000 to February 14, 2001.

This timeframe starts with the Student's entry into the Keewaydin classroom # 2 and continues though the placement at Whittier until the first day that the homebound instructor met with the Parent to schedule the Student for homebound instruction. This represents 90 days or 73 half days X 3 hours per day = 219 hours + 17 Fridays (full days) X 6 hours = 102 hours, 219+102 = 321 total hours of compensatory education. The Parent may use those hours in summer education support services or in an

after school capacity for tutoring as she sees fit to compensate for the education deprivation caused her son.

2. The Student has been denied the opportunity to participate in Extended School Year services for the summers of 1998, 1999, and 2000. Further the District has not agreed or disagreed to ESY for 2001 in a timely manner.

    a. The District will pay for ESY tuition at Calvin Academy for the summer of 2001. Given the denial of FAPE for this year; the Student is clearly in need of this service and meets the standard given his emerging behavior skills.
    b. The District will reimburse the Parent for personal costs incurred over the summers of 1998, 1999, and 2000 in providing educational services to the Student. Included in the reimbursement is:
        (i) $1,170.75 for cost of privately funded summer services – Minnesota Kids (summer, 1998) (F.12)
        (ii) $325.00 for cost of privately funded summer services at New Vision Boost Up (summer, 2000). (F. 48)

(iii) $2,000 for cost of privately funded summer Child Development Technician (summer, 2000) F. 48)

3. The District will reimburse the Parent for the cost of educational services for the Student at Calvin Academy from February 22, 2001 until the end of the academic year 2001.

4. Based on my review of the record, I believe it is imperative that this student has continuity and success in this next educational placement. Based on the denial of FAPE and meaningful educational benefit by the District, as well as the testimony, I am ordering that the Student be placed at Calvin Academy at District expense for the 2001- 2002 academic school year and the 2002 – 2003 academic school year. After this two-year placement, the educational team will need to meet to decide on the most appropriate placement for the Student.

Date: May 7, 2001

/S/ Robert J. Miller
Dr. Robert J. Miller, Independent Hearing Officer

20 U.S.C. Sec. 1400(c)

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) -

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a

successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by -

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local,

educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them -

(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs; and

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

20 U.S.C. Sec. 1401(8)

(8) Free appropriate public education

The term "free appropriate public education" means special education and related services that -

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. Sec. 1412(a)

In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:

(I) were not actually identified as being a child with a disability under **section** 1401(3) of this title; or

(II) did not have an individualized education program under this subchapter.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which

children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in **section** 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of **section** 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with **section** 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular

educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement

(i) In general

If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism does not result in placements that violate the requirements of subparagraph (A).

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that it will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

20 U.S.C 1414(a) –(d)

(a) Evaluations and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation, in accordance with this paragraph and subsection (b) of this section, before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Procedures

Such initial evaluation shall consist of procedures -

(i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and

(ii) to determine the educational needs of such child.

(C) Parental consent

(i) In general

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in

section 1401(3)(A) or 1401(3)(B) of this title shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

(ii) Refusal

If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 1415 of this title, except to the extent inconsistent with State law relating to parental consent.

(2) Reevaluations

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted -

(A) if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and

(B) in accordance with subsections (b) and (c) of this section.

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall -

(A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;

(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive

and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that -

(A) tests and other evaluation materials used to assess a child under this section -

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

(B) any standardized tests that are given to the child -

(i) have been validated for the specific purpose for which they are used;

(ii) are administered by trained and knowledgeable personnel; and

(iii) are administered in accordance with any instructions provided by the producer of such tests;

(C) the child is assessed in all areas of suspected disability; and

(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(4) Determination of eligibility

Upon completion of administration of tests and other evaluation materials -

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility will be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency.

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team described in subsection (d)(1)(B) of this section and other qualified professionals, as appropriate, shall -

(A) review existing evaluation data on the child, including evaluations and information

provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers observation; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine -

(i) whether the child has a particular category of disability, as described in section 1401(3) of this title, or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) the present levels of performance and educational needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum.

(2) Source of data

The local educational agency shall

administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(C) of this section, prior to conducting any reevaluation of a child with a disability, except that such informed parent consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the local educational agency -

(A) shall notify the child's parents of -

(i) that determination and the reasons for it; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

(B) shall not be required to conduct such an

assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

A local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(d) Individualized education programs

(1) Definitions

As used in this chapter:

(A) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes -

(i) a statement of the child's present levels of educational performance, including -

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to -

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child -

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

(v)

(I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of -

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

(vii)

(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title; and

(viii) a statement of -

(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of -

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of -

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who -

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State

agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2 year-old [11] child with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is -

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider -

(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) the results of the initial evaluation or most recent evaluation of the child.

(B) Consideration of special factors

The IEP Team shall -

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode,

academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child requires assistive technology devices and services.

(C) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii).

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team -

(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child

are being achieved; and

(ii) revises the IEP as appropriate to address -

(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

(5) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the

IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

(6) Children with disabilities in adult prisons

(A) In general

The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(17) of this title and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

(ii) The requirements of subclauses (I) and (II) of paragraph (1)(A)(vii) of this subsection (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of their age, before they will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of section 1412(a)(5)(A) of

this title and subsection (d)(1)(A) of this section if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

20 U.S.C. 1415(k)

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) School personnel under this section may order a change in the placement of a child with a disability -

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if -

(I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A) -

(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer

A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer -

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has

made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting

(A) In general

The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements

Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall -

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review

(A) In general

If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children -

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review

A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review

In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team -

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including -

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines that -

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to

understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability

(A) In general

If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title.

(B) Additional requirement

If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the

person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal

(A) In general

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of decision

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals

(A) In general

When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement

If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in

accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if -

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 1414 of this title; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of

knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance

with the provisions of this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities

(A) Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions

For purposes of this subsection, the following definitions apply:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled

Substances Act (21 U.S.C. 812(c)).

(3) Illegal drug

The term "illegal drug" -

(i) means a controlled substance; but

(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act (21 U.S.C. 801 et seq.) or under any other provision of Federal law.

(C) Substantial evidence

The term "substantial evidence" means beyond a preponderance of the evidence.

(D) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18.

29 U.S.C. Sec. 794

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of -

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local

government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or

more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment

28 U.S.C. Sec. 1291. - Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title

Federal Regulations

34 C.F.R. §300.7(C)(4)

Emotional disturbance is defined as follows:(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.(C) Inappropriate types of behavior or feelings under normal circumstances.(D) A general pervasive mood of unhappiness or depression.(E) A tendency to develop physical symptoms or fears associated with personal or school problems.(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

34 C.F.R. §300.660

(a) General. Each SEA shall adopt written procedures for--

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of § 300.662 by--

(i) Providing for the filing of a complaint with the SEA; and

(ii) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 300.660-300.662.

(b) Remedies for denial of appropriate services. In resolving a complaint in which it has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address:

(1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of

the child; and

(2) Appropriate future provision of services for all children with disabilities.

34 C.F.R. §300.661

(a) Time limit; minimum procedures. Each SEA shall include in its complaint procedures a time limit of 60 days after a complaint is filed under § 300.660(a) to--

(1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains--

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) Time extension; final decision; implementation. The SEA's procedures described in paragraph (a) of this section also must--

(1) Permit an extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(2) Include procedures for effective implementation of the SEA's final decision, if needed, including--

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) Complaints filed under this section, and due process hearings under §§ 300.507 and 300.520-300.528.

(1) If a written complaint is received that is also the subject of a due process hearing under § 300.507 or §§ 300.520-300.528, or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.

(2) If an issue is raised in a complaint filed under this section that has previously

been decided in a due process hearing involving the same parties--

(i) The hearing decision is binding; and

(ii) The SEA must inform the complainant to that effect.

(3) A complaint alleging a public agency's failure to implement a due process decision must be resolved by the SEA.

34 C.F.R. §300.662

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 300.660-300.661.

(b) The complaint must include--

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part; and

(2) The facts on which the statement is based.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 300.660(a) unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received under § 300.660(a).

Minnesota Statutes

Minn. Stat. § 626.556, Sub.2d.

Subd. 2. **Definitions.** As used in this section, the following terms have the meanings given them unless the specific content indicates otherwise:

(d) "Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825. Abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury. Abuse does not include the use of reasonable force by a teacher, principal, or school employee as allowed by section 121A.582. Actions which are not reasonable and moderate include, but are not limited to, any of the following that are done in anger or without regard to the safety of the child:

(1) throwing, kicking, burning, biting, or cutting a child;

(2) striking a child with a closed fist;

(3) shaking a child under age three;

(4) striking or other actions which result in any nonaccidental injury to a child under 18 months of age;

(5) unreasonable interference with a child's breathing;

(6) threatening a child with a weapon, as defined in section 609.02, subdivision 6;

(7) striking a child under age one on the face or head;

(8) purposely giving a child poison, alcohol, or dangerous, harmful, or controlled substances which were not prescribed for the child by a practitioner, in order to control or punish the child; or other substances that substantially affect the child's behavior, motor coordination, or judgment or that results in sickness or internal injury, or subjects the child to medical procedures that would be unnecessary if the child were not exposed to the substances;

(9) unreasonable physical confinement or restraint not permitted under section 609.379, including but not limited to tying, caging, or chaining; or

(10) in a school facility or school zone, an act by a person responsible for the child's care that is a violation under section 121A.58.

Minn. Stat. §121A.67

Aversive and deprivation procedures.

The commissioner must adopt rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district. The rules must:

(1) promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures;

(2) require that planned application of aversive and deprivation procedures be a part of an individual education plan;

(3) require parents or guardians to be notified after the use of aversive or deprivation procedures in an emergency;

(4) establish health and safety standards for the use of time-out procedures that require a safe environment, continuous monitoring of the child, ventilation, and adequate space; and

(5) contain a list of prohibited procedures.

Minnesota Rules

Minn. R. 3525.1329 Emotional and Behavioral Disorders.

Subpart 1. **Definition.** "Emotional or behavioral disorders" means an established pattern of one or more of the following emotional or behavioral responses:

A. withdrawal or anxiety, depression, problems with mood, or feelings of self-worth;

B. disordered thought processes with unusual behavior patterns and atypical communication styles; or

C. aggression, hyperactivity, or impulsivity. The established pattern of emotional or behavioral responses must adversely affect educational or developmental performance, including intrapersonal, academic, vocational, or social skills; be significantly different from appropriate age, cultural, or ethnic norms; and be more than temporary, expected responses to stressful events in the environment. The emotional or behavioral responses must be consistently exhibited in at least three different settings, two of which must be educational settings, and one other setting in either the home, child care, or community. The responses must not be primarily the result of intellectual, sensory, or acute or chronic physical health conditions.

Subp. 2a. **Criteria.** A pupil is eligible and in need of special education and related services for an emotional or behavioral disorder when the pupil meets the criteria in items A to C.

A. A pupil must demonstrate an established pattern of emotional or behavioral responses that is described in at least one of the following subitems and which represents a significant difference from peers:

(1) withdrawn or anxious behaviors, pervasive unhappiness, depression, or severe problems with mood or feelings of self-worth defined by behaviors, for example: isolating self from peers; displaying intense fears or school refusal; overly perfectionistic; failing to express emotion; displaying a pervasive sad disposition; developing physical symptoms related to worry or stress; or changes in eating or sleeping patterns;

(2) disordered thought processes manifested by unusual behavior patterns, atypical communication styles, or distorted interpersonal relationships, for example: reality distortion beyond normal developmental fantasy and play or talk; inappropriate laughter, crying, sounds, or language; self-mutilation, developmentally inappropriate sexual acting out, or developmentally inappropriate self-stimulation; rigid, ritualistic patterning; perseveration or obsession with specific objects; overly affectionate behavior towards unfamiliar persons; or hallucinating or delusions of grandeur; or

(3) aggressive, hyperactive, or impulsive behaviors that are developmentally inappropriate, for example: physically or verbally abusive behaviors; impulsive or violent, destructive, or

intimidating behaviors; or behaviors that are threatening to others or excessively antagonistic. The pattern must not be the result of cultural factors, and must be based on evaluation data which may include a diagnosis of mental disorder by a licensed mental health professional.

B. The pupil's pattern of emotional or behavioral responses adversely affects educational performance and results in:

(1) an inability to demonstrate satisfactory social competence that is significantly different from appropriate age, cultural, or ethnic norms; or

(2) a pattern of unsatisfactory educational progress that is not primarily a result of intellectual, sensory, physical health, cultural, or linguistic factors; illegal chemical use; autism spectrum disorders under part 3525.1325; or inconsistent educational programming.

C. The combined results of prior documented interventions and the evaluation data for the pupil must establish significant impairments in one or more of the following areas: intrapersonal, academic, vocational, or social skills. The data must document that the impairment:

(1) severely interferes with the pupil's or other students' educational performance;

(2) is consistently exhibited by occurrences in at least three different settings: two educational settings,one of which is the classroom, and one other setting in either the home, child care, or community; or for children not yet enrolled in kindergarten, the emotional or behavioral responses must be consistently exhibited in at least one

setting in the home, child care, or community; and

(3) has been occurring throughout a minimum of six months, or results from the well-documented, sudden onset of a serious mental health disorder diagnosed by a licensed mental health professional.

Subp. 3. **Evaluation.**

A. The evaluation findings in subpart 2a must be supported by current or existing data from:

(1) clinically significant scores on standardized, nationally normed behavior rating scales;

(2) individually administered, standardized, nationally normed tests of intellectual ability and academic achievement;

(3) three systematic observations in the classroom or other learning environment;

(4) record review;

(5) interviews with parent, pupil, and teacher;

(6) health history review procedures;

(7) a mental health screening; and

(8) functional behavioral assessment.

The evaluation may include data from vocational skills measures; personality measures; self-report scales; adaptive

behavior rating scales; communication measures; diagnostic assessment and mental health evaluation reviews; environmental, socio-cultural, and ethnic information reviews; gross and fine motor and sensory motor measures; or chemical health assessments.

B. Children not yet enrolled in kindergarten are eligible for special education and related services if they meet the criteria listed in subpart 2a, items A, B, and C, subitems (2) and (3). The evaluation process must show developmentally significant impairments in self-care, social relations, or social or emotional growth, and must include data from each of the following areas: two or more systematic observations, including one in the home; a case history, including medical, cultural, and developmental information; information on the pupil's cognitive ability, social skills, and communication abilities; standardized and informal interviews, including teacher, parent, caregiver, and child care provider; and standardized adaptive behavior scales.

Minn.R. 3525.0850 Behavior Interventions.

This policy is intended to encourage the use of positive approaches to behavioral interventions. The objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination. Behavioral intervention policies, programs, or procedures must be designed to enable a pupil to benefit from an appropriate, individualized educational program as well as develop skills to enable them to function as independently as possible in their communities.

Minn. R. 3525.2900 Subp. 5. The IEP and regulated interventions.

A. There are two types of regulated interventions: conditional procedures and prohibited procedures.

(1) Conditional procedures may only be used when included as part of the pupil's IEP or in an emergency situation according to part 3525.0200. In order to utilize a conditional procedure, the IEP team must:

(a) identify the frequency and severity of target behaviors for which the conditional procedure is being considered;

(b) identify at least two positive interventions implemented and the effectiveness of each; and

(c) design and implement regulated interventions based on present levels of performance, needs, goals and objectives, and document in the IEP.

(2) Prohibited procedures are interventions that are prohibited from use in schools by school district employees, contracted personnel, and volunteers. The procedures or actions listed in subitems (a) to (i) are prohibited:

(a) corporal punishment as defined in Minnesota Statutes, section 121A.58;

(b) requiring a pupil to assume and maintain a specified physical position, activity, or posture that induces

physical pain as an aversive procedure;

(c) presentation of intense sounds, lights, or other sensory stimuli as an aversive stimulus;

(d) use of noxious smell, taste, substance, or spray as an aversive stimulus;

(e) denying or restricting a pupil's access to equipment and devices such as hearing aids and communication boards that facilitate the person's functioning except temporarily when the pupil is perceived to be destroying or damaging equipment or devices;

(f) faradic skin shock;

(g) totally or partially restricting a pupil's auditory or visual sense not to include study carrels when used as an academic intervention;

(h) withholding regularly scheduled meals or water; and

(i) denying a pupil access to toilet facilities.

B. All behavioral interventions not covered in the IEP must be consistent with the district's discipline policy. Continued and repeated use of any element of a district's discipline policy must be reviewed in the development of the individual pupil's IEP.

C. If an emergency intervention is used twice in a month or a pupil's pattern of behavior is emerging that

interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional evaluation is needed, and, if necessary, to amend the IEP. Districts may use conditional procedures in emergencies until the IEP team meets, provided the emergency measures are deemed necessary by the district to protect the individual pupil or others from harm. The IEP team shall meet as soon as possible, but no later than five school days after emergency procedures have commenced. District administration and parents must be notified immediately when a regulated procedure is used in an emergency situation.

D. Time-out procedures that seclude a student in a specially designated isolation room or similar space must meet the following conditions:

(1) specific criteria for returning the pupil to the routine activities and regular education environment;

(2) an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;

(3) provision for the pupil to be continuously monitored by trained staff;

(4) adequate access to drinking water and to a bathroom for a time-out that exceeds 15 minutes;

(5) documentation of the length of time spent in each time-out procedure and the number of occurrences each

school day;

(6) a safe environment for the pupil where all fixtures are tamper proof, walls and floors are properly covered, and control switches are located immediately outside the room;

(7) an observation window or other device to permit continuous monitoring of the pupil;

(8) a space that is at least five feet by six feet or substantially equivalent to these dimensions and be large enough to allow the pupil to stand, to stretch the pupil's arms, and to lie down;

(9) be well-lighted, well-ventilated, adequately heated, and clean; and

(10) all applicable fire and safety codes.

E. A parent has the right to withdraw consent for a behavior intervention plan at any time by notifying the program administrator or designee and the district must stop the procedure immediately. After parental consent is withdrawn and the procedure is stopped, the school must send written acknowledgment to the parent and request parental signature. If a parent's signature to withdraw consent cannot be obtained, the district must document its efforts to communicate and obtain the signature. Parents must be contacted within three school days to determine the need to convene the IEP team to consider a change in program or placement.

Complaint File #1809
February 18, 2003
Stillwater ISD #834
NE Metro Intermediate District #916

Dear Superintendent and Complainant(s):

This letter is to inform you of the findings of the complaint entered by [Complainants] on behalf of [Student], a resident of Independent School District #834 (District #834). What follows is the report of the investigation, the issues, findings of fact, conclusions of law or rule, and order, where applicable. [Investigator] coordinated the investigation.

ISSUE #1

The Complainants allege the District used aversive and deprivation procedures, including restraint and seclusion, without following the proper procedures or in non-emergency situations. Specifically, the Complainants allege the District restrained the Student after the Student's parents withdrew consent for using restraint, used seclusion and restraint without conducting the necessary evaluation procedures to determine whether seclusion or restraint was appropriate for the Student, and used seclusion and restraint in non-emergency situations.

Findings of Fact

1. Student is 12 years old and in the seventh grade. The Student currently attends school at the Therapeutic

Learning Center (TLC), a day treatment program located in Stillwater (District #834), the Student's resident district. The Student began attending the TLC on January 3, 2003.

2. District #834 determined Student to be eligible for, and in need of, special education services by meeting state eligibility criteria for emotional behavioral disorders (EBD).

3. Since 1998, when the Student was in grade three, the Student has been placed, via the IEP team process, in Federal Setting IV educational settings within Northeast Metro Intermediate School District # 916 (District #916).

4. During the 2000-01 school year, the Student attended Valley Crossing Alternative Learning Program, a Federal Setting IV public separate day school within District #916.

5. On January 22, 2001, the Student's IEP team developed a new IEP which included the following:

> If [Student] is unable to work in the classroom, he may have the opportunity to work in an alternate space, such as the hallway outside of the classroom. If [Student] disrupts the learning of others, or engages in dangerous behaviors, conditional behavioral interventions may be

used, such as safety hold/carries or exclusional time out.

6. This IEP also included a "Behavioral Intervention Worksheet Assessment Summary Data and IEP Development." This document states, in relevant part:

> Documentation Ruling Out Medical or Health Factors: [Student] does need to be properly medicated for any intervention to be effective. Use of exclusional time out will not adversely affect any other health condition.
>
> Positive Interventions Presently Being Used: Praise, token economy, behavioral levels system token rewards for ignoring misbehavior of others, special contracts.
>
> Detailed description of conditional and other behavioral procedure(s): (A demonstration should be provided for the parents and team, including conditions under which it will be used.)
>
> A. [Student] will be given a verbal directive. Staff will move closer to him.
> B. If behavior continues, [Student] will be asked to go into the hall.
> C. If behavior continues, or anytime it poses a danger to others, he will be asked to go to kid's corner.

D. [Student] will stay in kid's corner (time out area) until he is calm. Locked Quiet Room will only be used for continued dangerous behavior and/or refusal to stay in the K.C. carrel area.

E. [Student] will complete a refocus sheet and show willingness to talk with staff calmly about the incident and any possible classroom expectations, such as make-up work.

7. The Student was transferred to the Creative Alternatives Program (CAP), a Federal Setting IV public separate day school, at Capitol View Center, within District #916 for the 2001-02 school year.

8. While attending CAP, on December 10, 2001, the Student's IEP team developed a new IEP which included the following "Adaptations In General and Special Education:"

- [Student] will be transported to and from school each day by special education transportation services.
- Academic instruction will be adapted to meet [Student's] academic needs, 1:1 and small group instruction will be utilized.
- Class periods will be 15-30 minutes in length.

- A Mental Health professional will be part of the program to help [Student] meet his goals (#2).
- [Student] will participate in D/APE to provide an additional small group social opportunity to work on goals (#1 & #2).
- Will be provided with a daily schedule specific to his academic level in each curriculum area.
- Sensory integration will be used as needed to reduce anxiety.
- [Student] will be graded with a percentage system based on the work he completed in each curriculum area. This does not necessarily represent grade level work.
- Proactive behavior management, utilizing sensory integration, social stories and Gentle Teaching strategies, will be implemented for [Student]. (see Proactive Behavior Management Plan)
- [Student] will be provided with 1:1 support to help him with social and academic strategies in the school setting.
- Non aversive physical restraint will be used if [Student] is endangering himself; others or property. (see BIP)"

9. The "Behavioral Intervention Worksheet Assessment Summary Date & IEP Development" attached to the December 10, 2001 IEP states, in relevant part:

Description of the Target Behavior(s): [Student] has demonstrated a pattern of noncompliance on a daily basis. This noncompliance is demonstrated by [Student] becoming involve [sic] with self-directed creative project when he helps himself to any school materials he feels he needs for the project and entering any area that may be a source of materials. [Student] will also leave the area of the program and the school building. When [Student] is interrupted from continuing on his own project agenda he will become verbally and physically aggressive. [Student] has made terroristic threats to blow up the school and has used a scissor to threaten staff.

Detailed description of conditional and other behavioral procedures: (a demonstration may be provided for the parents and team, including conditions under which it will be used)

- [Student] will work with 1:1 staff support outside of the classroom.
- [Student] will receive a printed daily schedule.
- [Student] will receive reminders of expectations through immediate feedback and through social stories.
- [Student] will receive affirmations to let him know he is important to us as a member of our classroom.

- Other students will join [Student] in leisure and academic activities as appropriate.
- Physical restraint will be used when [Student] becomes physically or verbally aggressive in resisting complying with program structure. The "focus room" will be used as an area to allow [Student] to deescalate. The door will be held shut when needed to prevent [Student] from harming himself or others or to contain his verbal aggression from interfering with other students' program plans.
- When appropriate law enforcement will be contacted in regards to [Student's] behaviors.
- Should the need for restraint exceed 45 minutes involving 2 or more staff [Student's] school day will be ended and his parents will be contacted to pick him up immediately from school.

10. The "Proactive Behavior Management Plan" attached to the December 10, 2001 IEP states, in relevant part:

> [Student] will work with 1:1 staff support outside of the classroom.
> [Student] will receive a printed daily schedule.
> [Student] will receive reminders of expectations through immediate feedback and through social stories.

[Student] will receive affirmations to let him know he is important to us as a member of our classroom.

11. District #916 contends:

> Evaluations were completed in January of 1999 and January of 2000 for [Student]. The January 2000 evaluation was a triennial reevaluation. Both evaluations examined the possible causes for [Student's] behavior and resulting responses from staff. Both evaluations were used in the development of the [IEPs], the Proactive Behavior Management Plans, and the Behavior Intervention Plans.

12. Further, District #916 contends the December 10, 2001 IEP indicates:

> ...the use of [manual] restraint was restricted to being used only when [Student] was physically or verbally aggressive in resisting program expectations and seclusion time out was taken out of the plan.

13. The Complainants did not attend the December 10, 2001 IEP team meeting.

14. On December 17, 2001, a re-entry meeting was held following the Student's three-day suspension. No amendments to the Student's IEP/BIP were proposed.

15. District #916 mailed the proposed IEP to Complainants on December 19, 2001.

16. On December 20, 2001, the Complainants revoked consent for the use of manual restraint by telephoning District #916. Specifically, the telephone log provided by District #916 states, in relevant part:

> [Complainant] Revoked permission for Hands on. He also said he does not want [Student] to have contact w/staff []. I told him that if he was revoking hands on, then [Complainants] need to be available to pick [Student] up if he is being unsafe. I also told him that while we waited for them to come, we would use the focus room to keep him safe.

Emphasis in original.

17. The Complainants did not object in writing to the proposed provision of services outlined in the December 10, 2001 IEP. As such, District #916 contends the December 10, 2001 IEP was thereafter implemented. However, District #916 states it only used manual restraint in emergency situations, per the telephone conversation with Complainants withdrawing consent for the use of manual restraint and continued to use the focus room in accordance with the IEP.

18. District #916 states:

In February of 2002 the school based members of the team attempted to meet with the [Complainants] to discuss interventions to be used with [Student] because [Complainants] had withdrawn consent to use [manual] restraint.

19. Specifically, on February 20, 2002, District #916 sent a letter attempting to arrange a meeting to discuss the Student's programming in response to Complainants request to have District #916 no longer use manual restraint on the Student.

20. On February 25, 2002, a re-entry meeting was held following the Student's three-day suspension. At this meeting, Complainants again reiterated their desire for the Student to not be manually restrained. Concern was raised by the Student's teacher that "the current plan isn't working well because it took 2.5 hours for a parent to arrive at school and [Student] is feeling that he does not need to follow staff directions because no one can put hands on him as the parents have requested." However, no other behavioral interventions were developed nor was the Student's IEP and/or BIP otherwise amended.

21. On March 12, 2002, a telephone conversation with Complainants and the Student's case manager occurred. According to the telephone log, the Complainants expressed concern about "[Student's] classroom placement." Specifically, the log states:

> [Complainants] think[] [Student] and [teacher] do not get along. I explained to [Complainants] that at [Student's] most recent meeting we had discussed this issue and that there is really no place else for [Student] to go. I explained that the other CAP room is full and is for older students, and the ALP would not be an appropriate placement for [Student] due to his neurobiological issues.

22. The March 12, 2002 telephone log goes on to state that Complainants still do "not want to give permission for 'hands-on' with [Student] … [and] reiterated his belief that if we don't push issues with [Student] we won't get into [emergency] situations."

23. The Complainants report that during almost every conversation with Capitol View staff, they informed the staff that Student escalates quickly and easily, and that they should not use manual restraint unless there is an actual emergency.

24. Capitol View staff also report that "hands-on," i.e., manual restraint, made the Student more aggressive.

25. On April 15, 2002, a re-entry meeting was held following the Student's one day suspension. According to the "Special Education Conference Report" completed at this meeting:

> We discussed thoughts for next year of CAP or ALP for placement for [Student]. [District #834] does not feel there's a better alternative within the home district otherwise. [District #834] remarked that we may think about ALP for next year. The plan for school is to continue as we have.. [sic] [Complainant] said that she was in favor of changing his plan to allow "Hands On."

26. District #916 contends that the April 15, 2002, document constitutes "permission for the use of [manual] restraint to be used in non-emergency situations."

27. No amendment to the Student's BIP or IEP was made as a result of the April 15, 2002 meeting. However, District #916 contends:

> On April 25, 2002, the school based members of the [IEP] team presented to [Complainants] a request to conduct a Functional Behavioral Assessment for [Student]. Unfortunately, [Complainants] did not respond to the request, nor did the team conduct an assessment following the 10 [sic] day waiting period.

28. The Complainants adamantly contend that they never agreed to allow District #916 to use manual restraint on the Student absent an emergency. Specifically, the Complainants contend:

...things always escalate out of control when [Student] is physically threatened, tackled, or restrained. . . . to most people, it would seem that physical force is necessary with [Student's] behavior – unless someone is in real physical danger, it is not; for the following reasons ...

1) history of mental illness: bipolar, OCD, ADHD as well as occasional episodes of psychotic thinking with paranoia. He believes aliens come out of him when in physical danger.
2) It ALWAYS makes the situation FAR worse. Then he ends up in the juvenile criminal system with other street thugs.
3) He ends up spending too much time in the time out room, in JDC, or at home because of suspension he receives very little education this way.
4) Staff continues to use a hands-on approach over situations that don't warrant it, after we said not to.
5) These physical altercations have at times included arms bent back, staff putting knees on his back and/or neck while he is down on his stomach – [Student] has complained of ongoing pain, loss of feeling, etc ...

Emphasis in original.

29. Subsequently, on May 13, 2002, District #916 contends a conversation with Complainants and District #916 changed the Student's placement to a

different program at Capitol View, the Alternate Learning Program (ALP). District #916 contends that the educational programming differences between CAP and ALP were explained to Complainants. Specifically, District #916 provides a telephone log which states "I did tell [Complainant] that the team was planning a significant change in programming (the ALP) for [Student] for next year and that we would meet in August to plan. He agreed."

30. The "focus room" referred to in the Student's December 10, 2001 IEP, while he attended CAP, is a room within a classroom. The focus room appears well lit, well ventilated, and clean. It is at least five feet by six feet in dimension and has a door which does not lock. The focus room has an observation window.

31. During the 2001-02 school year, District #916 did not document whether the Student was isolated in the focus room or whether staff or other students were present when the Student was placed there.

32. The Student contends he was isolated in the focus room and was often prevented from leaving the room by the staff holding the door shut.

33. During interviews, the District staff in the Student's classroom confirmed that the Student would be placed in the focus room alone, and that the door was held shut "pretty much anytime he went in there."

34. During the 2001-02 school year, District #916 did not document the length of time the Student spent in the focus room.

35. During the 2001-02 school year, the following documentation was provided on "Critical Incident Cover Sheets;" "Northeast Metro 916 C.A.P. Incident Reports;" and telephone logs pertaining to the use of manual restraint and the focus room for the Student:[1]

[1] Following District staff interviews, the Student's classroom teacher provided written documentation indicating that the focus room was not always used as a time-out for seclusion as previously indicated. According to the teacher, she was told by her administrator to create this document for purposes of responding to this complaint after the interview. The teacher indicated this document was created by "refreshing her memory" after "re-reading the Incident Reports." Since this information was recently recreated given old data and directly contradicts some information contained in the Incident Reports and telephone logs, the information was considered during this investigation, but was given only moderate weight in light of the aforementioned factors.

Date	Conditional Procedure Used	Length of Time Used	Suspension Y/N	Complainants Contacted Y/N
Sept. 12, 2001	Manual Restraint	"brief"		Yes
Sept. 26, 2001	Manual Restraint Focus Room Manual Restraint Focus Room Focus Room	½ hour 2 hours		
Oct. 26, 2001	Manual Restraint Focus Room			
Nov. 1, 2001	Manual Restraint -three persons Focus Room			Yes
Nov. 2, 2001	Manual Restraint Focus Room			
Nov. 15, 2001	Manual Restraint - three persons Focus Room			Yes
Nov. 28, 2001	Uncertain			
Nov. 29, 2001	Uncertain		Y – Two Days	Yes – Student sent home early
Dec. 12, 2001	Manual Restraint Uncertain if focus room used		Y – Three Days	Yes
Jan. 9, 2002	Focus Room "escorted"	10:40-11:10 "rest of day"		Yes - Student sent home early
Feb. 1, 2002	Uncertain			
Feb. 5, 2002	Uncertain			Yes - Student sent home early
Feb. 8, 2002	Uncertain			
Feb. 14, 2002 Feb. 14, 2002	Manual Restraint -"2 person hold" Manual Restraint	"about 5 minutes"		Yes
Feb. 21, 2002 Feb. 21, 2002	Manual Restraint Focus Room Manual Restraint		Y – Three Days	Yes - Student sent home early
March 11, 2002	Manual Restraint Focus Room			Yes
April 4, 2002	Uncertain			
April 11, 2002	Focus Room Manual restraint		Y – One day	Yes - Student sent home early
April 17, 2002	Focus Room Manual Restraint			Yes
April 18, 2002	Focus Room			Yes
April 22, 2002	Manual Restraint Focus Room			
May 20, 2002	Manual Restraint Focus Room			

36. According to a summary sheet provided by District #916, the Student was placed in the focus room and/or manually restrained for behavior, such as, "destroying classroom," kicking, scratching, bringing a cell phone to school, threatening to blow up the school, using a racquet as a weapon, throwing out computer files, and grabbing staff necklace.

37. According to the Incident Reports, the "focus room" and/or manual restraint were used for initial behaviors such as putting swear words on the computer, *see* Incident Report dated January 9, 2002; refusing to turn off the computer, *see* Incident Reports dated February 14, 2002, and November 2, 2001; being out of area, *see* Incident Report dated October 26, 2001. The full text of these documents may be found in the Appendix to this complaint.

38. Prior to entering the focus room, it was practice to remove students' shoes, for safety purposes. Staff reports that the Student "didn't like [his] shoes removed," and it would escalate the Student's behavior and would likely involve restraint.

39. In addition, the staff on occasion sought to empty the Student's pockets. This too led to the Student being manually restrained. *See* Telephone Log dated September 12, 2001, which states in pertinent part, "I explained that [Student] had some trouble today

w/not wanting to empty his pockets & there was a brief restraint."

40. The Complainants state that they were contacted on numerous occasions, and that it was for things such as the Student bringing stuff to school, e.g., a snake, cell phone, having mud on his pants, digging in dumpster, having a scissors, as well as to inform of the Student's behavior and to schedule meetings.

41. District #916 contends "the use of conditional procedures . . . were used as part of a developed Behavior Intervention Plan . . . or, after consent was withdrawn, in emergency situations that had been explained to the [Complainants]."

42. During the 2002-03 school year, the Student attended the ALP. District #916 explains:

> [Student] transferred to the [ALP] (from the [CAP]) for the start of the 2002-2003 school year. This decision was made by the [IEP] team (including [Complainants]). [Complainants] advocated for the change because they did not agree with the philosophy of the CAP and felt that a more behavioral and cognitive-behavioral approach should be used with [Student]. The school based members of the team supported the move because [Student] had not been successful in the CAP and felt a different approach might better meet his needs. The

[ALP] staff agreed to using strategies that had been successful for [Student] in the [CAP] as well as the new interventions of the [ALP].

43. District #916 admits there was no IEP team notice, meeting, or amendment changing the Student's educational placement and services when the Student was transferred from CAP to ALP.

44. District #916 contends the telephone conversation with Complainants on May 13, 2002, constituted "a systematic plan" incorporating time-out for seclusion into the Student's educational programming. District #916 admits there is no written documentation in the Student's IEP and/or BIP incorporating time-out for seclusion for Student as a result of this phone conversation.

45. While students attending CAP may be sent to the focus room, students attending ALP may be sent to the "options area." The options area is a specially designated area in the corner of Capitol View Center which has five "locked quiet rooms" (LQR), four processing study carrel areas, and a direct study area with tables and rooms. The options area is staffed by five educational assistants and a behavioral specialist commonly referred to as options staff.

46. The LQRs appear well lit, well ventilated and clean. They are at least five feet by six feet in dimension. The LQRs have an electronic locking device which is

activated by the key system. All LQRs have an observation window.

47. Prior to placing a student into an LQR, it is the practice to remove the students' shoes, empty the students' pockets and remove jewelry. This is done "for safety purposes."

48. The Complainants adamantly contend they never wanted the Student to be manually restrained or locked in a "steal room" absent a true emergency situation in which the Student or others were in danger since such procedures tended to escalate the Student.

49. On October 30, 2002, the Student's teacher telephoned the Complainants to inform them that the Student's triennial evaluation was upcoming to discuss a proposed evaluation plan.

50. On November 7, 2002, a notice requesting permission to conduct a Triennial Reevaluation, which included an FBA, was sent to Complainants. According to District #916, the Complainants did not respond, and the reevaluation was not started while he attended the ALP.

51. On November 13, 2002, the Student was suspended from the ALP. He did not return to the ALP following his suspension which ended November 18, 2002.

52. During the 2002-03 school year, the approximately two months the Student spent at ALP, the Student was sent to the options area and manually restrained on at least 15 separate occasions. Specifically, District #916 provided documentation indicating the following procedures being used on the Student from September 2002, through November 13, 2002:

Date	Locked Quiet Room Y/N	Manual Restraint Y/N	Minutes	Student Behavior which Initiated the Procedure
Sept. 18, 2002			45	Threatening/intimidating
Sept. 19, 2002			20	Disruption
Sept. 23, 2002	Y	Y	35	Disruption
Sept. 26, 2002	Y	Y	15	Not following directions
Oct. 1, 2002			25	Disruption
Oct. 7, 2002	Y	Y	10	Assault on adult
Oct. 28, 2002	Y	Y	60	Not following directions
Oct. 29, 2002			40	Behavior Likely
Oct. 31, 2002			10	Out of place
Nov. 6, 2002			8	Disruptive
Nov. 7, 2002			84	Profanity
Nov. 7, 2002	Y		16	Assault on adult
Nov. 7, 2002	Y		30	Disruptive
Nov. 8, 2002			4	Disruptive
Nov. 13, 2002	Y	Y	42	Behavior Likely

53. The Student was isolated when he was placed in LQR.

54. District #916 reports that the Student would be released from the LQR "when calm and able to respond."

55. District #916 did not document the actual amount of time the Student spent in LQR as opposed to the options area. Instead, the "minutes" represents the length of time options staff was involved in the incident with the Student.

56. A District #916 administrator stated that when a student is in LQR, a staff person would be "within 10 feet" of the room, and the staff person is to check on the student every "30 seconds to two minutes." Options staff confirmed this and added there is always somebody at "the desk" (which is within 10 feet of the LQRs) but there may also be other people assisting with monitoring depending on what else was going on.

57. District #916 provided one telephone log for October 28, 2002, indicating that they called the Complainants to inform that the Student was exhibiting inappropriate behavior and used LQR.

58. No Incident Report or other documentation was provided dated November 7, 2002.

59. The Complainants contend they did not receive copies of any Incident Reports prior to filing this complaint.

60. The behaviors exhibited by the Student which led to LQR and/or manual restraint included walking out of the room and refusing to work in class, *see* Interview Form dated September 26, 2002; failing to pour a bottle of pop in one place in the sink, *see* Incident Report dated November 13, 2002. The full text of these documents may be found in the Appendix to this complaint.

61. The Student's classroom teacher reports that the Student's behavior which would lead to manual restraint or the LQR would be when the Student was directed to work, non-compliant and/or damaging property.

62. The Student reports that he would inform the staff that he needed his personal space. *See, e.g.,* Student's version of November 13, 2002 incident in the Appendix to this complaint.

63. The Student reports "at my new school they don't put their hands on me and that's what makes my day so

perfect." Referring to Capitol View, the Student states "when they touch me I get angry; it would make me upset." "It hurts – feels like my bones are out of place."

64. The Complainants assert the Student received red marks and was hurt during an incident on November 13, 2002.

65. Staff report that they incurred scratches, cuts, kicked, twisting of their arm, and a staff member broke an arm while restraining the Student.

66. District #916 indicates that "keeping a student in seclusion time out for extended periods of time was against program policy." Specifically, the school policy for "Assigned Time In The Quiet Rooms:" states:

> Program policy states that if a student is still in time out after 20 minutes, the Case Manager must be notified and a team decision made regarding another intervention, or the continuation of the time out.

67. District #916 contends:

> [t]he [ALP] continued to use [manual] restraint and seclusion time out as part of a systematic

plan to respond to [Student's] maladaptive acting out behaviors because [Complainants] continued to indicate support for such interventions.

Conclusion

1. Minnesota Rule 3525.0800, subp. 1 provides:

> ...a pupil's district of residence is responsible for assuring that an appropriate program is provided for all eligible pupils placed by the district's team within the district or in an out-of-district placement regardless of the method or location of instruction used.

2. Minnesota Rule 3525.0800, subp. 4 provides:

> If the resident district places a pupil in an out-of-district placement, the resident district is still responsible to assure that an appropriate IEP is developed, that the pupil is placed in the least restrictive environment, and that due process procedures associated with these responsibilities are followed.
>
> It is the responsibility of the providing district, agency, or academy to implement the IEP, conduct periodic and annual reviews, convene

and facilitate the IEP team meeting, and assure that due process procedures associated with these responsibilities are followed.

The annual IEP must be developed jointly by the providing district, agency, or academy and resident district. The resident district may appoint a member of the providing district as its representative.

3. District #834 is the Student's resident district.

4. District #916 is the providing district.

5. Minnesota Statute § 121A.67 requires the commissioner of CFL to adopt rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district. Specifically, the rules must:

   A. promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures;
   B. require that planned application of aversive and deprivation procedures be a part of an individual education plan;
   C. require parents or guardians to be notified after the use of aversive or deprivation procedures in an emergency;

D. establish health and safety standards for the use of time-out procedures that require a safe environment, continuous monitoring of the child, ventilation, and adequate space; and

E. contain a list of prohibited procedures.

6. Accordingly, Minn. R. 3525.0850 provides guidance on the use of positive approaches to behavioral interventions:

> This policy is intended to encourage the use of positive approaches to behavioral interventions. The objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination. Behavioral intervention policies, programs, or procedures must be designed to enable a pupil to benefit from an appropriate, individualized educational program as well as develop skills to enable them to function as independently as possible.

7. Federal regulation at 34 C.F.R. § 300.346(a)(2) requires the district to:

> In the case of a child whose behavior impedes his or her learning or that of others, consider, if

appropriate, strategies, including positive interventions, strategies, and supports to address that behavior.

8. Conditional procedures are regulated procedures under Minnesota Rule and are defined in Minn. R. 3525.0200, subp. 1g to include:

   A. aversive and deprivation procedures which are not prohibited;
   B. the use of manual restraint;
   C. the use of mechanical or locked restraint;
   D. time-out procedures for seclusion; and
   E. temporary delay or withdrawal of regularly scheduled meals or water not to exceed 30 minutes except as provided in subpart 2a.

9. Manual restraint is defined in Minn. R. 3525.0200, subp. 8e as:

   ... physical intervention intended to hold a pupil immobile or limit a pupil's movement by using body contact as the only source of physical restraint.

10. Time-out for seclusion "involves procedures which place the pupil in a specially designated isolation

room or similar space." Minn. R. 3525.0200, subp. 25b.

11. Whether a specially designated room is locked is not the determinative factor in determining whether a procedure constitutes time-out for seclusion. The key consideration is whether the Student was isolated from others.

12. During the 2001-02 school year, District #916 used the focus room for time-out for seclusion. During the 2002-03 school year, District #916 used LQR for time-out for seclusion. Each time the Student was isolated in a specially designated room or similar space, District #916 was obligated to follow the procedures outlined in Minn. R. 3525.2900, subp. 5D unless an emergency existed.

13. Minnesota Rule 3525.2900, subp. 5D provides:

> Time-out procedures that seclude a student in a specially designated isolation room or similar space must meet the following conditions:
>
> 1. specific criteria for returning the pupil to the routine activities and regular education environment;

2. an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;
3. provision for the pupil to be continuously monitored by trained staff;
4. adequate access to drinking water and to a bathroom for a time-out that exceeds 15 minutes;
5. documentation of the length of time spent in each time-out procedure and the number of occurrences each school day;
6. a safe environment for the pupil where all fixtures are tamper proof, walls and floors are properly covered, and control switches are located immediately outside the room;
7. an observation window or other devise to permit continuous monitoring of the pupil;
8. a space that is at least five feet by six feet or substantially equivalent to these dimensions and be large enough to allow the pupil to stand, to stretch the pupil's arms, and to lie down;
9. be well-lighted, well-ventilated, adequately heated, and clean; and
10. all applicable fire and safety codes.

14. A CFL memorandum to all Minnesota Directors of Special Education, dated May 15, 2002, clarified that Minn. R. 3525.2900, subp. 5D(1) "requiring specific

criteria for returning a student from seclusion . . . include[s] an IEP team determination of the length of time the student may remain in seclusion."

15. The memorandum also clarified that under Minn. R. 3525.2900, subp. 5D(3):

> ...the term "continuously" has implications sometimes overlooked in local school districts. It means observation by trained staff without interruption and does not allow for intermittent checks to see how the student is doing while placed in isolation.

16. Minnesota Rule 3525.2900, subp. 5A provides that conditional procedures may only be used when:

> ... included as part of the pupil's IEP or in an emergency situation according to part 3525.0200. In order to utilize a conditional procedure, the IEP team must:
>
> i. identify the frequency and severity of target behaviors for which the conditional procedure is being considered;
> ii. identify at least two positive interventions implemented and the effectiveness of each; and
> iii. design and implement regulated interventions based on present levels of

performance, needs, goals and objectives, and document in the IEP.

17. Minnesota Rule 3525.2710, subp. 4F, effective November 26, 2001, provides:

> Prior to using any conditional procedure, the IEP team must conduct a functional behavioral assessment (FBA) as defined in part 3525.0200, subpart 3a. The team must also document that it has ruled out any other treatable cause for the behavior, for example, a medical or health condition, for the interfering behavior.

18. Minnesota Rule 3525.2710, subp. 4B requires a district to "obtain informed parental consent . . . prior to conducting any reevaluation" of a student.

19. Evaluations for special education purposes, which include FBAs, must be conducted within 30 school days from the date a district receives parental permission to conduct the evaluation. *See* Minn. R. 3525.2550.

20. Minnesota Rule 3525.0200, subp. 2c defines emergency as:

> ... a situation in which immediate intervention is necessary to protect a pupil or other

individual from physical injury, emotional abuse due to verbal and nonverbal threats and gestures, or to prevent severe property damage. The emergency intervention must be the least intrusive intervention possible to reasonably react to the emergency situation. This subpart does not prohibit staff persons from using reasonable force to protect themselves or other pupils or students as provided in Minnesota Statutes, section 609.379.

21. Emergency interventions are governed by Minn. R. 3525.2900, subp. 5C which provides:

> If an emergency intervention is used twice in a month or a pupil's pattern of behavior is emerging that interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional evaluation is needed, and, if necessary, to amend the IEP. Districts may use conditional procedures in emergencies until the IEP team meets, provided the emergency measures are deemed necessary by the district to protect the individual pupil or others from harm. The IEP team shall meet as soon as possible, but no later than five school days after emergency procedures have commenced. District administration and parents

must be notified immediately when a regulated intervention is used in an emergency situation.

22. Minnesota Rule 3525.2900, subp. 5E provides:

> A parent has the right to withdraw consent for a behavior intervention plan at any time by notifying the program administrator or designee and the district must stop the procedure immediately. After parental consent is withdrawn and the procedure is stopped, the school must send written acknowledgment to the parent and request parental signature. If a parent's signature to withdraw consent cannot be obtained, the district must document its efforts to communicate and obtain the signature. Parents must be contacted within three school days to determine the need to convene the IEP team to consider a change in program or placement.

23. Minnesota Rule 3525.3600 requires districts to prepare and serve a notice to parents before the initiation or significant change or the refusal to initiate or significantly change a pupil's educational placement or special education services. *See also*, 34 C.F.R. § 300.503. This notice must inform parents that the district will proceed with the proposed placement and provision of services unless the

parents object in writing within 14 calendar days. Minn. R. 3525.3600, subp. C.

24. Minnesota Rule 3525.0200, subp. 19a defines "significant change in program or placement as:

A. the IEP goals have been completed or require modification based on a progress report;
B. there is a need to add or delete a service based on a progress report or evaluation;
C. there is a change in the type of site or setting in which the pupil receives special education services;
D. the amount of time a pupil spends with nondisabled peers is changed;
E. the amount of special education to accomplish the goals or objectives needs to be increased or decreased; or
F. the team determines there is a need for a conditional intervention procedure.

25. District #916 failed to follow consistent criteria for returning the pupil from the focus room and from the LQR to his routine activities as the Student's IEP does not include the length of time the Student may remain in time-out for seclusion.

26. There is no evidence that the Student was evaluated to determine whether seclusion was contraindicated

for psychological or physical health reasons prior to its use of time-out for seclusion. The inclusion of the conclusorary statement in the January 22, 2001 IEP that "[Student] does need to be properly medicated for any intervention to be effective. Use of [time-out for seclusion] will not adversely affect any other health condition" is not sufficient evidence that the team ruled out any other treatable cause for the Student's interfering behavior prior to the use of manual restraint and/or time-out for seclusion. Further, the evaluations referenced by District #916 do not include any reference to conditional procedures or the effect such may have on the Student.

27. There is insufficient evidence to confirm the Student was continuously monitored while in time-out for seclusion. Having staff at a desk within 10 feet of an LQR does not demonstrate continuous monitoring.

28. District #916 did not properly document the length of time the Student spent in each time-out procedure during the 2001-02 school year when the Student was placed in the focus room nor during the 2002-03 school year when the Student was placed in LQR.

29. As such, District #916 failed to properly incorporate the inclusion of conditional procedures into the Student's IEP during the 2001-02 school year.

30. Even if, arguably, District #916 properly incorporated manual restraint into the Student's December 10, 2001 IEP, the Complainants withdrew consent on December 20, 2002. District #916 did not attempt to contact Complainants until February to address the need to convene the IEP team to consider a change in program or placement. District #916 never changed the Student's IEP/BIP as a result of the withdrawal of consent or otherwise.

31. District #916 argues the Complainants "reinstated" the use of manual restraint on April 15, 2002, during the re-entry meeting. Even if this were the case, District #916 failed to properly incorporate the use of manual restraint into the Student's IEP/BIP. Specifically, it failed to follow the appropriate evaluation procedures, prior notice, IEP team meeting and documentation.

32. District #916 failed to properly incorporate the use of conditional procedures into the Student's IEP during the 2002-03 school year. The May 13, 2002 conversation between District #916 staff and the Complainants did not constitute the proper procedure for adding a conditional procedure to the Student's IEP/BIP.

33. By failing to appropriately incorporate the use of manual restraint and the use of time-out for seclusion

into the Student's IEP, during both the 2001-02 and 2002-03 school years, District #916 was authorized to use such only in emergency situations.

34. The weight of the evidence shows there were times District #916 used conditional procedures too quickly in addressing the Student's behavior. At the point in time in which conditional procedures were used, an emergency did not necessarily exist and/or the conditional procedure used was not the least intrusive. However, during the course of the interventions, it is not disputed that the situation was eventually elevated to an emergency situation. Examples are found on the Incident Reports dated October 26, 2001; November 2, 2001; January 9, 2002; September 26, 2002; November 13, 2002. The full text of these documents may be found in the Appendix to this complaint.

35. District #916 held only one IEP team meeting during the 2001-02 school year and 2002-03 school year despite the continued use of conditional procedures. Conditional procedures were used at least 21 times (manual restraint) and time-out for seclusion at least 20 times.

36. District #916 failed to convene an IEP team meeting in order to determine if the Student's IEP was adequate and if additional evaluation was needed, or

if a change in placement was warranted to better handle the Student's potential aggression. At least two separate provisions of the law required District #916 to convene the Student's IEP in this case: 1) an emergency procedure was used twice in a month or the Student's pattern of behavior was emerging that inferred with the achievement of the Student's educational goals and objectives; and 2) the change in the Student's educational programming from CAP to the ALP.

37. It appears that District #916 staff appropriately contacted the Complainants during the 2001-02 school year. However, it on at least three occasions during the 2001-02 school year, District #916 failed to contact Complainants when conditional procedures were used in apparent emergency situation. Further, during the 2002-03 school year, it appears District #916 only contacted the Complainant one time about the use of conditional procedures when such were used on at least seven occasions.

38. District #916 failed to provide the Complainants with written notice, hold an IEP team meeting, and thereafter, amend or revise the Student's IEP before the significant change in the Student's educational services when the Student was transferred from CAP to ALP and was incorporating or planning on implementing conditional procedures.

39. District #916 failed to timely conduct evaluations, specifically, the FBA in April 2002.

Decision

District #916 violated Minn. R. 3525.2710 and 3525.2900, subp. 5A when it failed to appropriately incorporate conditional procedures into the Student's IEP and thereafter, used conditional procedures in non-emergency situations.

District #916 violated Minn. R. 3525.2900, subp. 5C when it failed to convene an IEP team meeting after using an emergency intervention twice in a month or the Student's pattern of behavior was emerging that interfered with the achievement of the Student's educational goals and objectives during the 2001-02 school year and the 2002-03 school year.

District #916 violated Minn. R. 3525.2900, subp. 5C when it failed to notify the Complainant immediately when regulated procedures were used in emergency situations throughout the 2001-02 school year and 2002-03 school year.

District #916 violated Minn. R. 3525.2900, subp. 5E when it failed to contact the Complainants within three school days to determine the need to convene the IEP team to

consider a change in program or placement once the Complainants withdrew consent for manual restraint.

District #916 violated Minn. R. 3525.3600 by failing to provide the Complainants with prior notice of a significant change of educational services, hold an IEP meeting, and thereafter, amend or revise the Student's IEP.

Corrective Action

1. District #916 asserts new forms have been developed for the use of time-out for seclusion. District #916 must provide a copy of the new form used to document the use of manual restraint and time-out for seclusion. The information provided by District #916 must include the form used by ALP, for the quiet rooms, as well as any form used by CAP, for the focus room. This information must be submitted to [Due Process Specialist], Due Process Specialist, who is assigned to oversee this corrective action, within 14 days of this decision. District #916 must conduct a training for all staff regarding the appropriate procedural requirements when planning for the use of conditional procedures and also the procedural requirements when using conditional procedures in emergency situations. This training must take place within 30 days of the date of this decision. Within 14 days of this decision, District #916 must submit a proposed agenda for the training. The information

must include the names of the people who will receive the training, the person(s) who will conduct the training, and the topics to be covered.

2. Within five days of the training, District #916 must provide [Due Process Specialist] with a list of the staff who attended the training.

3. District #834 must ensure an immediate independent educational reevaluation (IEE), including: a functional behavioral assessment, a determination of whether there is any other treatable cause for the Student's interfering behavior, for example, a medical or health condition; whether time-out for seclusion is contraindicated for psychological or physical health reasons; and whether the Student needs any compensatory educational services as a result of the use of conditional procedures, is conducted at District #916 expense. Within five days of the date of this decision, the Student's current IEP team must be convened for the purpose of proposing a qualified independent examiner. The IEE is contingent on receipt of consent for the evaluation. District #834 must provide documentation that this has occurred with this directive within seven days of this decision to [Due Process Specialist].

4. Within five days of the completion of the IEE, District #834 must convene the Student's IEP team to

review and revise the Student's IEP to reflect the findings of the IEE. District #834 must send the ER, the proposed IEP, and the corresponding Notice of Proposed Special Education Services, including the Student's response, to [Due Process Specialist] no later than March 30, 2003, unless a time extension is granted for good cause.

In addition, the Student's IEP team must develop a compensatory educational plan, if necessary, for the Student in accordance with the IEE. This plan must be agreeable to the Student, educationally meaningful, address all areas of disability, and be convenient for the Student to access. District #834 must notify [Due Process Specialist] in writing of the plan for compensatory services, if any. If the IEP team and the Complainants are unable to reach an agreement on a plan for compensatory services, District #834 must notify Ms. Tschetter within five days of the team meeting regarding the reasons for the impasse at which time CFL will make the determination on a plan for compensatory education services. Any costs associated with the compensatory educational plan are to be paid by District #916.

5. This decision will be forwarded to [MOMA Supervisor], Supervisor for CFL's Maltreatment of Minors Program to determine whether there is sufficient evidence of physical or mental injury to

warrant further investigation under Minn. Stat. § 626.556.

ISSUE #2

The Complainants allege the District is not providing a free appropriate public education (FAPE). Specifically, the Complainant alleges the Student has not been in school or otherwise received special education services from the District following an incident on November 13, 2002.

Findings of Fact

1. From November 14, 2002, through November 18, 2002, the Student was suspended from the ALP.

2. According to District #834, "the [Complainants] refused to send [Student] to school under the current IEP and placement at . . . ALP" following the November 13, 2002 suspension. Furthermore:

> The [Complainants] refused to attend two IEP meetings scheduled to discuss their concerns. After meeting with Stillwater to express their displeasure, they were offered homebound services as an interim placement while alternative placements were explored. Again, the [Complainants] chose not to attend an IEP

meeting to initiate these services, and chose to wait for an alternate placement at the [TLC]. The TLC placement became available at the end of December and this placement has been completed as of 1/3/03.

3. An IEP team meeting was scheduled for November 18, 2002, "to review [Student's] placement and discuss current concerns with his program." However, the Complainants would not attend a meeting with District #916, ALP.

4. Another IEP meeting was scheduled for November 22, 2002, at the ALP. Again, the Complainants informed that they would not attend a meeting with District #916, ALP.

5. Another IEP meeting was set for November 26, 2002, in Stillwater. The Complainants attended this meeting and the parties agreed "that an alternative placement needed to be pursed." The TCL placement was discussed and homebound services "were offered, and the [Complainants] were told that a meeting would have to occur with the homebound teacher to discuss instruction length of time and specifics of the services. [Complainants] agreed this was an appropriate plan."

6. On December 12, 2002, District #916 contacted the Complainants to initiate homebound services. District #916 informed the Complainants "that it was necessary to have a team meeting with the homebound teacher to discuss what service would be provided and for what duration. In addition, the IEP would need to be changed and written consent obtained to initiate homebound services. It was indicated that these services could begin soon after we met and that a homebound teacher had been identified."

7. On December 13, 2002, the Complainants met with TLC staff. Thereafter, on December 20, 2002, District #916 contacted Complainants to check on the status of the placement.

8. On December 27, 2002, an IEP team meeting was held to discuss placement at TLC, and the team agreed that Student would start school on January 3, 2003, following the holiday break.

9. District #834 provided documentation indicating that a homebound instructor was arranged for the Student on December 3, 2002.

10. The Complainants confirm that they did refuse to send the Student back to the ALP; however, they contend they never refused homebound services and

wanted the services for the Student. By the time they were notified to start the services, it was too close to the holidays, and the TLC placement had been arranged.

Conclusion

1. Minnesota Rule 3525.0300 provides that "pupils with disabilities who are eligible for special education services based on an appropriate individual evaluation shall have access to free appropriate public education."

2. Federal regulation at 34 C.F.R. § 300.13 defines FAPE as special education and related services that "are provided at public expense, under public supervision and direction, and without charge."

3. Federal regulation at 34 C.F.R. § 300.121 requires public school districts to provide FAPE to students with disabilities. *See also*, Minn. Stat. § 125A.03.

4. FAPE is tailored to the unique needs of each student by means of the IEP. *Board of Educ. v. Rowley*, 458 U.S, 176 (1982).

5. The Student did not receive any educational services following the November 13, 2002 suspension which

ended on November 18, 2002, until January 3, 2003, 23 school days.

6. The Student was allowed to return to the ALP on November 18, 2002.

7. The Complainants elected not to have the Student return to the ALP as the relationship between the school, Student and home had completely broken down.

8. District #834 attempted to arrange for homebound instruction pending possible placement opportunities into day treatment facilities.

9. District #834 arranged for a home instructor to be available effective December 3, 2002, however, was unable to communicate such to the Complainants.

Decision

District #834 is not in violation.

The authority to review complaints is given in the federal regulations to the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. §§ 300.660-.662. Questions about this decision should be directed to the complaint investigator, [Investigator]. If the Complainant has

subsequent concerns about the District's implementation of the corrective action, he/she should contact due process specialist, [Due Process Specialist].

Sincerely,

Norena A. Hale, Ph.D.
Manager
Division of Accountability and Compliance

Appendix

Incident Report dated October 26, 2001, states:

> [Student] was out of area (CAP) in hallway by bathroom. He wanted boxes and was told "no." He began yelling and screaming at staff who escorted him without much resistance to focus room in 102, [Student] began pulling molding from bottom of walls. [Staff] was alone with him at the point. Told him he need [sic] to stop. He continued. [Staff] walked toward him and he hit her with a short piece so she restrained him. He instantly relaces, talked calmly and said he felt as if his bones were broken and he was squished. He was released and continued to lie motionless stating the feeling of being squished

and broken. [Options staff] was summoned and spoke to [Student] about feeling squished.

Incident Report dated November 2, 2001, states:

> [Student] and some of his classmates were using the computer during some free time. The computer was being used to make sounds and voices. The staff had told [Student] and the others to stop and disperse from the area near the computer. The other students did. [Student] also left the area with persuasion from 2 staff. About 2 minutes later [Student] returned to the computer, and despite staff redirection, began playing around with it. Staff asked [Student] to stop and move away from the computer. [Student] swore at staff and refused. Sensing that a power struggle was going to take place staff [] took [Student] out of the room by carrying him. [Student] was taken to Room 102 and a staff switch was done. [] took over and [Student] calmed down and went home safely. [Staff] received scratches on hand that bled very slightly. After washing them they stopped bleeding.

Incident Report dated January 9, 2002, time 10:40 to 11:10, states:

[Student] was on the computer playing with games while 2 students and a staff from 103 were in Rm 104. [Student] begin [sic] to put swear words on the computer using student's and staff names from the program and he also was getting the other 2 students going so I told [Student] to stop or I will unplugged [sic] the computer and [Student] wouldn't and he got upset and ran out of the room up and down the hall and up and down the stairs so I told [Student] to calm down and return to 104 and he finally went in and I closed the door and he begin [sic] to get upset more and picked up the phone like he was going to hit me with it so I called options staff and when they arrived [Student] was picking up the computer and being unsafe so we decided to call his dad and [Student] calm downed [sic] a little and he was told to remain in the focus room until the end of the day. Called [Student's] dad escort [Student] to focus room for the rest of day.

Incident Report dated February 14, 2002, time 10:50 to 11:30, states:

[Student] was in Room 104. He had a computer he was using. His schedule changed and the computer was to be put aside until his next assignments were completed. [Student] would not listen to instructions from 2 staff to put the computer down. Options was

called and [police liaison officer] came down. He explained to [Student] what needed to be done. [Student] got angrier, started turning red and swearing and he threatened to throw the computer and smash it that is when staff grabbed [Student's] arms and took the computer. [Student] then started to kick and hit staff. So [police liaison officer] took [Student] down to the floor and restrained him. [Student] was allowed to call his uncle who is an officer on [police liaison officer's phone]. After talking with his uncle [Student] was calmed down. The computer was locked up and [Student] calmed down. The computer was locked up and [Student] calmed down.

Another Incident Report filled out by another staff dated February 14, 2002, time 10:50 to 11:30 states:

I was in Rm. 104 with another student giving him instructions to turn off the computer he was working on and let's get going on his health work the student refused so another staff called for some assistance so the other staff came and gave the student clear instructions to put the computer down and do his health and then he can continue to work on the computer. The student refused to give up the computer and continued to be off task and do what he was told so another staff decided to called [sic] the students parent's the student got really angry and picked the computer at a staff so me and another staff

took the computer from the student and we had to give him a 2 person take down and he calmed down in about 5 minutes and then we let him up and he still was talking about he was going to get staff fi [sic] and in trouble and that he was going to call his uncle and get staff fired and one of the staff new his uncle and gave his uncle a call and the student talked to his uncle and finally calmed down and said he was going to do his work. Staff let student talk to his uncle who is a police officer and then student get [sic] on task.

Interview Form dated September 26, 2002:

Walk out of room, walking allover the hall [not legible] disrupting classes students, refusing to work in class.

Anecdotal Log dated September 26, 2002:

8:10 left room w/out permission – students were respectfully asking him to lower his voice. Off task – out in hallway – saying faggott. [sic] Yelling around room. A lot of arguing with staff today.

Incident Report dated November 13, 2002:

[Student] was directed by [staff person] to dump out his bottle of pop at the drinking fountain. He was given several directions and did not follow them. I stepped behind him and held the bottle so that it would pour down the drain. He said, "leave me the fuck alone." He then threw the bottle top at me hitting me in the right ear. I approached him and directed him into options. He swung his fist at me striking me in the right cheek/lower jaw. I then restrained him and [staff] assisted escorting him to options. He grabbed onto my sweatshirt and [staff person] had to pry his fingers off of me. He refused to empty his pockets and needed to be restrained in order for staff [sic] empty pockets. He swung several times as [staff person] was restraining him.

Incident Report dated November 13, 2002:

[Student] was in LQR. [Student] got the door open. [Staff person] walked over to [Student] as he was exiting the quiet room. [Staff person] told [Student] he needed to go back into the LQR. [Student] refused and said "I got the door open manually." [Staff person] repeated the direction to move back into the LQR. [Student] refused and said "I will punch you in your face." [Staff person] repeated the direction. [Student] again said "I'm not going back in there I will punch you in your face." As [Student] was saying

it, his right hand was making a fist. [Police liaison officer] then approached [Student] and told him he was under arrest and to move into the LQR. [Student] followed the [police liaison officer's] direction the [sic] door was closed and locked.

Incident Report dated November 13, 2002:

Staff saw that [Student] had an open bottle of soda in his locker. He was asked to turn it over & refused. [Staff person] attempted to open his locker & remove the bottle so to avoid a power struggle. Staff was not able to open it. He was asked to come to his locker and was told he needed to open it as the lock would be cut off. He opened it. Staff reminded him of the rule of no soda & no open containers being brought into the building. He agreed to dump it, when [staff person] approached as a back up. He went to the water fountain & started dumping it all over the sink. He was directed to dump it directly down the drain. He refused. Staff said to dump it down the drain so the entire water fountain did not get sticky. He refused. Staff put hands on the bottle & [Student's] arm to dump it. At that time he threw a bottle cap at [staff person]. He hit her in the ear. She then attempted to put him in a restraint. He then swung twice at her, hitting her in the face once. [Staff person] attempted to assist and was kicked on the

thigh. Two more staff approached to assist & brought him into a locked quiet room, 3 staff held him, took off his shoes & emptied his pockets.

Incident Report dated November 13, 2002:

Coming upstairs from the high school hall way [two staff persons] was [sic] a student the student was pushing, shoving and swinging his arms [sic] he threw a punch and he hit [staff person] in the face. At that point I grab [sic] the student from behind then the other two staff had both arms then we escorted [Student] to the LQR he was still very out of control still putting up a fight we got him in with the door locked then we had to go back in to remove his shoes and anything in his pockets at that point I ask [Student] to remove his shoes and anything in his pocket. He refuse [sic] to. That's we [sic] went back in he started using profanity toward us he starting [sic] punching at us. He tried to punch me in my face. He scratch my hand and arm, at that point [two staff persons] had to restrain him and took him down and remove [sic] everything on him and his shoes still fighting with us [staff person] got out the LQR first then myself he tried to kick me while I was moving out [sic] the LQR but he miss me then we locked the LQR no more info.

Incident Report dated November 13, 2002:

[Two staff persons] were escorting [Student] to options & encouraging him to pour out then contents of a pop bottle. [Student] was resisting and saying things like, "leave me alone, " "I fucking hate this shit," "I'm tired of this shit," As I was walking away [staff person] asked for my assistance. I turned and saw [two staff persons] struggling to escort [Student]. As I approached [Student] began flalling [sic] his arms and punched [staff person] in the face. [Four staff persons] escorted [Student] into a Quiet Room.

Student's Report of November 13, 2002 Incident:

On the day of November 13th, 2002, I didn't have time to make a lunch so I grabbed a bottle of diet coke. When I got to school I was starting a good day, on working on my school work and my makeup work when my Staff told me I couldn't have that so I better dump it down the water fountain or they will call my parents. So I went over to the water fountain and started dumping it down. [Two staff persons] Came Over And Said "Hey what are you doing your making a mess!" I was not making a mess, because there is no better way to pour it into the sink, I had the tip of the bottle touching the drain, pouring into the drain. So [two staff persons] put their hands on me really hard and

said "GIVE ME THE BOTTLE!" then I said "Can you please let go of me so I can give you the bottle?" then [staff person] Said "NO! I'M going hold on, and your going to give me that bottle." Than I said "I need my personal space" he said "You know what your full of it, your not going to give me problems ever!" then the staff from options, including [two staff persons] Started Tackling Me To The Ground, Well Unfortunately, I did not fall to the ground. Then the process of them tackling me and taking me to a LQR (Locked Quiet Room) room I started kicking and punching, because they had their hands on me hurting me and I have marks, the marks are not documented in to the Ramsey County Court Systems, mean while in the LQR the Deputy [] open the door and said "Come on, let's go." "where I asked. He said "to JDC" then I said "why" he said "because that's your second assault, come on now, lets go" so I did not refuse I just left with him so I would not be in trouble. Then I ended up In JDC. (Juvenile Detention Center) NOTE: During my time at JDC The Nurse requested me to come down to have her look at my arm, she documented it, and said "to put at least 5 Ice-packs about every day, and I am restricting PHY ED for 5 Days. Because Of Your Arm In Pain, Let It Heel.

Complaint File #1760
December 19, 2002
Rosemount-Apple Valley-Eagan ISD #196

Dear Superintendent and Complainant(s):

This letter is to inform you of the findings of the complaint entered by [Complainant] on behalf of Students at Dakota Ridge (Students), residents of Independent School District #196 (District). What follows is the report of the investigation, the issues, findings of fact, conclusions of law or rule, and order, where applicable. [Investigator] coordinated the investigation.

ISSUE #1

The Complainant alleges the District failed to respond appropriately to the behaviors of Students at the Dakota Ridge School (DRS). Specifically, the Complainant alleges the District improperly used aversive and deprivation procedures, improperly used police liaison officers in lieu of implementing appropriate behavior plans, and failed to develop, review, and revise Students' IEPs in response to Students' behaviors.

Findings of Fact

1. DRS is a Federal Setting IV program. It provides educational services for Students with significant emotional behavioral needs in grades kindergarten through 12. Approximately 130 Students attend DRS at any time.
2. DRS has 11 rooms called "breakout rooms." The breakout rooms appear well lit and ventilated. They

are at least five feet by six feet in dimension. The breakout rooms are generally located adjacent to classrooms. The breakout rooms are locked from the outside and require a key to enter, but are not locked from the inside. All breakout rooms have an observation window.

3. CFL requested the following information from the District:

   A. a list of Students placed at Dakota Ridge;
   B. documentation of the use of any time-out for seclusion areas, including the names of Students and duration of use;
   C. documentation concerning any use of police liaison officers with Dakota Ridge Students;
   D. a list of Dakota Ridge Students who were placed in seclusion or have seclusion in their IEPs; and
   E. any other information relevant to the issues presented.

4. In its response, the District submitted four exhibits:

   A. a list of 184 Students enrolled at Dakota Ridge in the 2001-02 school year;
   B. a summary of the number of times and length of time 113 Students were placed in isolated seclusion;
   C. 15 documented uses of a police liaison officer with Dakota Ridge Students, and
   D. a list of 54 Students who were not placed in isolated seclusion.

5. An initial review of the District's response and eight Student files was conducted by three complaint investigators. The file review consisted of examining Student special education files as well as a separate secondary file maintained by DRS of the Students' point level sheets and documentation of breakout room use on "recording sheets." This initial review revealed a number of inconsistencies. For example:

   A. There were three additional documented incidents of the police liaison officer being involved with Students.
   B. The District's summary of the use of isolated seclusion did not match the breakout room records and, in one instance, documentation of at least 15 additional uses of seclusion in a breakout room were found in the Student's file.
   C. There were 17 Students who were unaccounted for with respect to whether they were placed in isolated seclusion.
   D. Two Students who were listed as not being placed in isolation, but had documentation in their files of breakout room use.
   E. There were at least five instances where documentation of a Student was placed in the file of another Student.

6. The personnel in charge of DRS (DRS Administration) was informed of inconsistencies between the file review and the District's response, and that additional file reviews would subsequently be required. A total of 37 student files were reviewed. These files represented a sample including Students:

A. who were most frequently placed in breakout rooms for isolated seclusion;
B. who the District indicated were involved with the police liaison officer; and
C. who were listed as not being placed in breakout rooms for intervention purposes.

7. Of the 37 files reviewed, the secondary files of four Students were not available. The DRS Administration indicated that it was "unable" to locate the secondary files of four Students even though the District had reported them as being placed in the breakout room and or being involved with the police liaison officer.

8. During the course of the investigation, interviews of former and current Students, parents of former and current Students, county social workers, and DRS staff and administrators were conducted. It should be noted that several parents and staff contacted the lead investigator on their own accord, individually or in groups, to express issues and concerns relating to DRS. Several District employees reported fears of retaliation by the DRS Administration for contacting CFL or cooperating with CFL, but no facts regarding retaliatory acts were described.

9. The District indicates:

   All students enrolled at Dakota Ridge School during the 2001-02 school year had detailed Behavior Intervention Plans (BIP's) in place in the IEP's

10. Each of the Student IEPs included the following "DRS Procedures":

DRS PROCEDURES FOR DEALING WITH [STUDENT'S] DISRUPTIVE BEHAVIOR

In the event of a Conflict with a Peer:

1. Adults will monitor and intervene quickly if [Student] is unable to resolve a conflict on his own.
2. Depending on the situational factors, and the threat to safety for staff and students, options will be given to [Student] for coping with the situation:
   a. Conflict mediation;
   b. Ignoring peer;
   c. Removing self from the situation, like use of a breakout room or alternative seating arrangement;
   d. Getting involved in an alternative activity;
   e. Offer [Student] the opportunity to talk to an adult in the program whom student identifies as a support person;
   f. Offer [Student] opportunity to talk to his parents (or other adult parent has approved) [sic] by phone.
3. Remove other students from the situation to help de-escalate it. The student(s) who are being appropriate and accepting adult intervention will be the ones who will be removed to a safe area.

   This procedure is used to prevent the need for the use of restraint.
4. [Student] will be sent home if none of the above procedures are working and there appears to be a risk that the situation will

escalate. This will only be used if there is concern for safety of students or damage to property. This procedure would be used to prevent behavior from occurring that would likely result in suspension.

5. A suspension would result if:
   a. [Student's] behavior presented a danger to himself or other students or the staff;
   b. No interventions by staff were effective;
   c. Staff needed time to review and adapt procedures, if needed, to prevent future occurrence of problem.
6. Restraint will be considered as a possible intervention in a situation deemed an emergency, in which [Student's] behavior places himself or others in danger. The restraint must be able to be done in a way that is considered safe to [Student], and staff, and when there are no other options available for dealing with the crisis.

11. This statement was essentially the same in all IEPs except the Student's name was changed and there were some formatting differences. Except for two Students, there was no other behavior intervention plan (BIP) besides the duplicate statement of DRS Procedures in the 37 files that were reviewed.

12. The file review revealed five instances of IEPs including the following statement:

LD ADAPTATIONS

[Student] will need access to easier READING materials in the classroom. Assignments may need to be shortened or otherwise modified to meet [Student's] learning needs. Directions may need to be given in more direct, step-by-step, or individualized ways, both verbally and visual form. [Student] may need visual cues throughout the day to facilitate learning. More time to process information, to express ideas, and to complete assignments may need to be provided. Tests in the content areas may need to be given verbally. A peer scribe and/or designated note taker may be helpful. Difficult material may need to be read to [Student]. [Student] may need the option of moving to a quiet place to process challenging information. The use of organizational tools and strategies as well as a daily communication log between home and school may assist [Student's] educational progress. [Emphasis in original]

13. Similarly, the least restrictive environment (LRE) explanation and adaptations sections on each Student's IEPs are nearly identical to the following example:

> [Student] needs the low student to staff ratio provided by the DRS classroom as well as the high level of structure provided in the classroom to be successful. DRS provides a planned reinforcement system/point system. Behavior monitoring and feedback to the students are also

provided. DRS offers intense supervision, verbal reinforcement and behavior support.

14. DRS has a three-level point system for all Students. Generally, as Students earn or retain points for good behavior, they advance up the level system and receive corresponding rewards. The District indicates Students lose points if they exhibit behavior that is determined to be verbal inappropriate, off task, behaviorally inappropriate, being out of the area, inappropriately physical, or provoking.

15. More specifically, the DRS Administration indicated that Students start with 100 points and lose points for inappropriate behavior. At level 1, Students need to maintain at least 65 points before proceeding to level 2. At levels 2 and 3, Students need to maintain at least 85 points in order to stay at that level, go to the next level, or be able to access rewards and privileges commensurate with that level. The DRS Administration indicates that certain more "serious" behavioral incidents result in an automatic level drop or the breaking of a contract.

16. The DRS Administration indicated that each Student and parent is provided with a verbal explanation of the point system, contracts, and use of the breakout rooms when the Students first come to the school in an "intake" process. These explanations are not provided in written form to Students or parents.

17. In the 2001-02 school year, if Students were at level 1, they were not able to attend "safety-sensitive" classes such as art or physical education and were

instead placed in the breakout out rooms for isolation. The District indicates it has ceased this practice of not allowing Students to attend certain classes because of their point level, but the overall point level system remains.

18. The Dakota Ridge site also has a contract system that allows Students to sign "contracts" with the school regardless of whichever level they are on. The District reported a contract might contain a specific behavior or set of behaviors that the Student agrees to try to stop or minimize. Completing a contract may result in some type of privilege or reward.

19. Parents of current and former Students were interviewed. Some parents were asked about their understanding of the point system. In general, parents indicated concerns that this system made it very difficult for Students to maintain or strive for good behaviors because the rules for losing points, dropping levels, and/or having a broken contract were not clear or consistent. Several parents reported their Students informed them that there was no reason to try because they were already too far from level 3 and that almost "any behavior" would result in a level drop even if they got to level 3.

20. Most of the parents also indicated concerns that this system favored or disfavored Students with certain types of disabilities. Some parents pointed out that the system might be useful for Students who were able to control their behaviors, but not for those who had a more limited capacity to control or even understand their behaviors, such as Students who have autism

spectrum disorders, severe emotional problems, or other disabilities.

21. Some staff members also reported the level system does not seem to be working for many Students at Dakota Ridge who have different abilities and capacities to understand and control their behavior, especially those Students who have autism spectrum disorders, developmentally cognitively disorders, or who are eligible under the other health disability. Additionally, staff members reported that Students who are on level 1 have no consequences for additional inappropriate behavior because level 1 is the lowest you can go, and in-school suspension (ISS) is viewed as a break from the classroom.

22. The District:

> …acknowledges that the MDCFL determined that there were numerous problems with the manner in which conditional procedures were developed and implemented with respect to the one student who was subject of Complaint File #1730. For that reason, Dakota Ridge staff plans to revisit the IEPs of all current Dakota Ridge students to determine the following:
>
> - Whether a proper functional behavioral assessment (FBA) was conducted and documented which specifically supports the use of the specific conditional procedures contained in the student's IEP.
> - If so, whether the IEP and incorporated behavior intervention plan continues to be

appropriate and responsive to student behavior. In answering this question the IEP team will consider whether the behavior intervention plan is sufficiently individualized for the student and in compliance with Minn. Rule 3525.0850 and Minn. Rule 3525.2900.

- If an FBA was not done, or if the FBA did not specifically consider the use of the specific conditional procedures contained in the student's IEP, a new FBA will be completed in accordance with Minn. Rule 3525.0200, Minn. Rule 3525.2900, subp. 5A(1) and Minn. Rule 3525.2710, subp. 4F. If the IEP team thinks it may be necessary to continue to use time-out for seclusion with the student, the FBA will specifically include a determination of whether seclusion is contraindicated for psychological or physical health reasons as required by Minn. Rule 3525.2900, subp. 5D(2).

Dakota Ridge plans to complete this process by winter break. To the extent that the MDCFL finds there to be violations with respect to the use of aversive and deprivation procedures or the responsiveness of IEPs to student behavior, the School District respectfully asks the MDCFL to find that the School District's self-imposed corrective action is sufficient to remedy the violation.

23. District Administration reported that the systemic changes being carried out in response to File #1730 necessarily creates some "upheaval," requiring a period of adjustment. Furthermore, the objections raised by some staff to CFL interviewers represented preferences to continue past practices which CFL, and the District are seeking to change as improvements.

24. DRS has since acknowledged that it would not meet its goal of completing the list of FBAs by winter break. The District has additionally obtained the services of an outside expert and began using the person to modify District procedures.

25. The District provided a list of 26 students with current FBAs. The District also provided a list of 14 students who have FBAs being currently conducted. Three students are indicated on both of these lists.

26. The District:

> denies that it used aversive and deprivation procedures without following proper procedures or that it failed to develop, review and revise IEPs in response to student behavior … Dakota Ridge staff members used non-prohibited aversive and deprivation procedures (i.e. conditional procedures) in accordance with those IEPs. In cases in which a student's IEP was not effectively responsive to student behavior, the IEP team met and attempted to revise the IEP.

27. An effort was made to review cases representing elementary, middle, and high school Students. A summary of information covering the 2001-02 school year (including the Student's disability eligibility category, number of times in the breakout room, cumulative length of time in the breakout room, date of most recent FBA as indicated by the District, date of proposed FBA completion date, whether the police liaison officer was used) from the file review is included below. Note that the suspension information is based on information in the Students' files and may not be complete or accurate in all instances:

See chart following page:

Student	Grade	Special Education Eligibility Category	# of Times in Breakout Room	Cum. Total Minutes in Breakout Room	Suspensions/ Total Days	FBA Completed	Prop. FBA	Police Liaison Officer
1	10	OHI	54	2125	4/8			y
2	6	EBD, MMMI, S/L	NR*	NR	2/2			y
3	9	EBD, SLD	111	5361	6/9	2/12/01		y
4	9	ASD	NR	NR	8/8			
5	8	MMMI, EBD	NR		1/1			
6	9	EBD, SLD	83	5554	7/7	5/3/01		y
7	8	EBD, SLD	84	3171	4/6			
8	8	EBD, SLD	27	1045	0/0			y
9	11	MMMI, EBD	24	2010	3/4			y
10	5	EBD	NR		2/6			y
11	9	EBD	38	1786	2/2			y
12			7	235	1/1			y
13	9	EBD, SLD	73	3770	6/8			
14	7	EBD, MMMI	NR					
15	9	EBD	36	1853	4/8			y

16	8	EBD	99	4565	7/9			
17	11	EBD	65	2643	5/5			y
18	12	EBD	9	275	1/1			y
19	12	EBD, SLD	44	2024	4/8			y
20	11	EBD, SLD	3	98	1/1			
21	8	EBD, S/L, SLD	106	5174	4/6			
22	10	MMMI, EBD	NR					y
23	9	EBD, SLD	NR					
24	12	OHI, S/L, EBD	NR					
25	7	EBD, OHI	18	2030	3/3			y
26	8	EBD	112	4783	13/17	10/31/01	11/27/01	y
27	8	EBD	70	1937	8/18			y
28	11	EBD	73	4038	2/2			y
29	8	EBD	33	1769	3/3	12/12/01		y
30	9	EBD	60	2551	3/5			y
31	6	EBD	9	535		5/10/01		
32	11	EBD	29	902	3/5			y
33	12	EBD	NR		5/11			
34	7	OHI, EBD	NR					
35	11	EBD	27	1366	5/5			y
36	7	OHI	55	2434	3/5	1/7/01		
37	5	ASD	12	870			11/19/01	

* NR= Not Reported

28. The amount of time Students were in a breakout room ranged from less than 5 minutes to a full school day of six and a half hours.

29. For the 54 Students in grades 9 through 12 who were listed as being placed in a breakout room during the 2001-02 school year, on average they were in the breakout room 16 times; the highest number of times for any one Student in this grade range was 93 times during one school year.

30. For the 50 Students in grades 6 through 8 who were listed as being placed in a breakout room during the 2001-02 school year, on average they were in the breakout room about 32 times; the highest number of times for any one Student in this grade range was 112 times during one school year.

31. For the eight Students in grades one through five who were listed as being in a breakout room during the 2001-02 school year, on average they were in the breakout room about six times; the highest number of times for any one Student in this grade range was 12 times during one school year.

32. Interviewed parents uniformly report not being informed of breakout room use. It should be noted that the District has developed new procedures for recording breakout room use and informing parents. Parents since confirm an increase in notification from the school.

33. The recording sheets reflect that staff informed Students that they could not use the bathroom or have

a drink, or only use the bathroom or have drink if they were quiet for a certain amount of time as follows:

Time of Request	Request	Staff Response	Time allowed to use bathroom or get a drink
12:45	asked for a bathroom break.	was told he had to sit appropriately for 5 min.	not indicated
3:10 3:20	still hollering for a glass or water or to go to the bathroom hollering to go to the bathroom he said "I'll pee on ya all"	was told he already used up his breaks	not indicated
12:32	said he had to go to the bathroom	I told him no, he should have went when he got a drink.	12:55
2:25	asked for bathroom	was told to sit quietly for 5 min.	2:33
2:15	opened door and asked if he could use the bathroom	I said no	not indicated
10:40	"I gotta take a [bathroom break]"	I told him I'd take him to the bathroom when he gives up his walkman	11:30, 2:40
NR	He's asked to go to bathroom	I said in 5 minutes if he's quiet and good.	10:30
11:30	was vulgar about using the bathroom	said 5 minutes of quiet, you can use the bathroom	not indicated
11:50 11:55 12:03	take me to the f** bathroom take me to the f** bathroom demanded bathroom	none	not indicated
10:35	asked for a drink	told to behave appropriately for 5 minutes and then he can have a drink	not indicated
NR 2:55	 wants a drink	told if he was appropriate he could go for a drink told him to be appropriate for 30	not indicated

		minutes and he could have one	
3:25	asked for a drink	was told no	not indicated
3:00	still yelling she has to go to the bathroom	if she walks out of the breakout room, she will be escorted out of the building	not indicated

35. The file review revealed 11 incidents where Students were restrained, "escorted," or carried.

36. The DRS Administration indicated that all documentation of incidents involving the police liaison officer were forwarded to District legal counsel and the District special education director in the preparation of the District's response.

37. The District's response included 15 documented incidents involving the Police Liaison Officer including:

- 11 incidents where the police liaison officer was mentioned or the police liaison officer talked to a Student;
- 1 incident where the police liaison officer held a breakout room door shut when a Student was trying to open it;
- 1 incident where the police liaison officer accompanied a Student to his locker;
- 1 incident where the police liaison officer searched a Student and the Student's locker; and
- 1 incident where the police liaison officer removed an item from a Student in a breakout room.

38. At the time of the file review, the documentation of police liaison officer use provided to CFL did not appear in the respective Student's file. It is unclear where those documents are currently located. The extent of police liaison officer use generally ranged from the officer talking to a Student to the officer restraining a Student. Specifically, the file review revealed these additional facts:

- 15 incidents where the police liaison officer or police department was mentioned or where the police liaison officer talked to a Student;
- 5 incidents where the police liaison officer removed items, such a desk, stapler, or CD player from a Student in a breakout room;
- 3 incidents where the police liaison officer searched a Student or a Student's locker;
- 1 incident where the police liaison officer held a breakout room door shut when a Student was trying to open it;
- 1 incident where a Student was sent to a breakout room for not listening to the police liaison officer;
- 2 incidents where the staff consulted with the police liaison officer before calling the county crisis team;
- 7 incidents where the staff apparently requested assistance from the police liaison officer;
- 15 incidents where the police liaison officer "escorted," "removed," "put" a Student into a breakout room, or physically restrained or touched a Student (often, staff members accompanied with or assisted the police liaison officer during these incidents);

- 3 incidents where police intervention was threatened; and
- 6 incidents where truancy or trespassing charges were mentioned as a consequence.

39. The District maintains that it did not use the police liaison officer instead of implementing appropriate behavior plans and "any actions by the Dakota Ridge police liaison officer were law enforcement actions that were not subject to the Student's BIPs or the laws relative to the education of disabled Students." The District also refers to its response on this issue in Complaint File #1730.

40. The District's discipline policy, "The Overview of Student Rights and Responsibilities, 2001-02 School Year," at page 11 provides:

    Administrators may involve law enforcement authorities as necessary. If a student violates a district policy or regulation, which is also a violation of a law, the student will be referred to the police in addition to being dealt with as described here.

41. The school police liaison officer at DRS for the 2001-02 school year was contracted through the Dakota County Sheriff's Department.

42. Pursuant to the contract, the District pays the County "an amount equal to 75% of the cost of the salary and benefits for the officer provided." Additionally, the District provides the "work

space . . . office furniture, telephone, utilities, computer access and clerical support and supplies" while the County provides training for peace officer licensing, uniforms, and "other supplies and services customarily provided for deputies in the Dakota County Sheriff's Office."

43. According to the "General Duty Deputy School Police Liaison Deputy" document provided by the Dakota County Sheriff's Department, the school police liaison officer's duties and responsibilities are as follows:

These examples do not include all possible tasks in this work and do not limit the assignment of related tasks in any position of this class.

- Provides security for students and staff.
- Assists school officials in responding to unusually disruptive behavior.
- Takes statements regarding misdemeanors and completes police reports.
- Facilitates communication and cooperation with county juvenile authorities, local police officials, and members of the professional community.
- Assists the school staff in understanding the Dakota County Juvenile Court System, law enforcement issues, and the court referral process.
- Provides an in-house law enforcement source for school staff and students in processing criminal matters.

- Provides training to students and staff regarding legal issues, crime and drug prevention, and delinquency programs.
- Serves as a role model and endeavors to build rapport with students and staff.

44. The District contends:

> Police liaison officers are not District employees. They are employed by local law enforcement agencies. In the case of the officer assigned to Dakota Ridge, he was employed by the Dakota County Sheriff's Office....Please note that the contract makes it clear that the police liaison officer is not an agent of the District and that he operates based upon his own initiative, judgment and discretion. The contract clearly provides that the officer is trained by the Sheriff's Office and is present in the school for purposes of providing law enforcement services.

45. The District states:

> Police officers do not enforce school discipline policies or involve themselves in curricular matters. They do not act as educational or related service providers for students with IEPs. They serve a strictly law enforcement function. While the MNDCFL apparently found there to be some blurring of the line between law enforcement provider and educational service provider with respect to the student in Complaint File #1730, the same can not be said

with respect to the Dakota Ridge population as a whole.

46. The file review revealed an IEP for one Student that expressly included the police liaison officer in a BIP as follows:

> BEHAVIOR INTERVENTION PLAN (BIP)
> When [Student] is being inappropriate in class, or having a difficult time, this is the plan that will be followed:
> STEP 1 – [Student] will ask to move into a breakout room or the teacher will ask [Student] to move. If the teacher asks [Student] to move to the breakout room, he will have two minutes to choose to move to the breakout room. After two minutes, he will be asked to move again. Once again, he will have two minutes to respond. If after two minutes he has not gone to the breakout room, we will move to step 2.
> STEP 2 – Teacher will contact a Dakota Ridge administrative staff member to come down and ask [Student] to move to the breakout room. He will be given two minutes. If after two minutes, he still has not complied with the directive, the police liaison officer will be called down.
> STEP 3 – Police liaison officer will escort [Student] to the breakout room. If [Student] is physically or verbally disruptive in the breakout room, he will be told he has five minutes to get things under control.

STEP 4 – If [Student] has not gotten himself under control after five minutes, [Parent] will be called to come pick up [Student]. [Student] will be informed that he is now suspended and he must stay in the breakout room until somebody picks him up.

STEP 5 – If [Student] refuses to stay in the breakout room, he is charged with trespassing.

These are the steps that will be followed to help [Student] stay in school and complete his school work. However, these steps do not have to be followed if staff feel [Student] is being unsafe or threatening staff or students. If he becomes unsafe at any point, he will just be suspended.

47. The DRS Administration indicated that the police liaison officer was possibly included because of the police liaison officer's positive relationship with the Student. The DRS Administration indicated it was not aware of any other IEPs or BIPs that included the police liaison officer.

48. This Student's IEP also included the "DRS Procedures." It is unclear from the IEP whether the BIP is implemented first before going to the steps in the Procedures or if the Procedures' steps are implemented first.

49. The police liaison officer, a county police department sergeant, and a lieutenant were interviewed. They indicated the police liaison officer did not go to any

IEP meetings and to their best knowledge, the police liaison officer was not included in any Student IEPs.

50. The police liaison officer reported the following types of student misconduct at Dakota Ridge:

Conduct	2001-02 School Year	2002-03 School Year (up to 10-29-02)
Disorderly Conduct	42	13
Fifth Degree Assault	11	10
Gross Misdemeanor or Felony Level Assault	4	
Fourth Degree Damage to Property	11	3
Third Degree Damage to Property	1	
First Degree Damage to Property		1
Total Estimated Cost of Damaged Property	$1000.00	$1425.00
72 Hour Holds	3	
Warrant Arrests	4	
Trespass on School Property	3	
Minor Consumption	2	
Possession of Tobacco by a Minor	7	1
Controlled Substance	3	3
Sexual Assault Investigations	2	
Felony Contributing to the Delinquency of a Minor		1

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51. Staff members report that the number of assaults in the current school year is dramatically more than the total number of assaults in the previous school year. Staff members provided multiple examples of Students who threatened staff, brought weapons to school, flipped desks and threw erasers, fought in school, broke classroom windows, and who placed staff members in fear of their safety but whose consequences where believed to be minor or inconsequential.

52. The DRS Administration stated that the District was also seeking to hire a behavioral analyst for the purpose of meeting the needs of the Student population.

53. Several parents indicated that their children informed them that the DRS Administration and other staff agitated Students or escalated their behavior when they were in breakout rooms or during IEP team meetings.

54. Staff members reported that the school's ISS room frequently contains Students from the elementary, middle, and high school level at the same time, and this has resulted in physical altercations and younger Students being placed in dangerous situations. Staff also report that Students have indicated that ISS is viewed as a place where they can be with their friends and where they do not have to do school work. ISS is generally supervised by pupil support assistants.

55. The file review revealed many instances of Students being charged for cleaning expenses and for destruction of property. Many charges were

approximately $8.00, but some exceeded $100.00. The file review did not reveal any instances of IEPs including a provision for payment of expenses.

56. Staff members report that because parents typically pay for these charges, the Students' conduct is not deterred as they do not necessarily feel any financial impact.

57. Some parents indicated they refused to pay for the bills because they did not agree with the charges given the nature of the Students' disabilities and because of their understanding that the school needed to provide a free education.

58. The file review revealed six instances where staff members indicated a Student may be trespassing or truant for not coming to school during suspension, opening a time-out room door, not going into a time-out area, or not leaving a time-out area. Additionally, the file review revealed three instances where police intervention was mentioned as a consequence for a failure to comply with a staff directive of this nature.

59. The DRS Administration indicated that discussion of truancy or trespassing may have been related to a provision concerning a Student's relationship with county social services. The DRS Administration indicated that this practice ended because of changes in the truancy law.

60. Staff members report that truancy is currently and frequently mentioned and discussed in front of Students as a consequence for behavior. During a

site-visit, the complaint investigator observed a Student sitting in the lobby who refused to go into class. Several staff members were questioning whether the Student was truant because of his refusal.

61. Students indicated school staff members continue to mention the potential of truancy and trespassing charges. Students also indicate that at certain times when they were suspended, school staff members informed the Students that if they remained on school grounds following suspension, they would be considered as trespassing and that if they left they would be considered truant, and police intervention would be used.

Conclusions

1. Federal regulation at 34 C.F.R. § 300.662 requires the state educational agency (SEA) to investigate complaints alleging violations occurring up to three years for allegations of continuing violations.

2. Minnesota Rule 3525.0300 provides that "children and youth with disabilities and who are eligible for special education services based on an appropriate individual assessment shall have access to free appropriate education."

3. Federal regulation 34 C.F.R. § 300.13(d) defines a free appropriate education as special education and related services that "are provided in conformity with an individualized education program (IEP)."

4. A free appropriate public education (FAPE) is tailored to the unique needs of each Student by means of the IEP. *Board of Educ. v. Rowley,* 458 U.S. 176 (1982).

5. Federal regulation at 34 C.F.R. § 300.346(a)(2) states when special factors must be considered in developing a student's educational plan.

> In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

6. If the Student has an emerging "pattern of behavior" that "interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional assessment is needed, and, if necessary, to amend the IEP." *See* Minn. R. 3525. 2900, subp. 5(C).

7. According to 34 C.F.R. § 300.350 (a), the District must:

> Provide special education and related services to a child with a disability in accordance with the child's IEP; and (2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

8. A review of Student files establishes that several parts of Students' IEPs are not individualized. Each of the

reviewed files has the same "DRS Procedures" statement that discusses specific steps to react to Student behaviors. Except for two Students, there is no written evidence of individualized behavioral intervention plan despite substantial evidence of need for Students to learn more appropriate behavior. Additionally, the LRE explanation and adaptations sections of the Students' IEPs are also nearly identical. Moreover, Students who have been classified under the specific learning disabled (LD) eligibility criteria have the same learning disorder learner statement on their IEPs. In these regards, the Students' IEP are not individualized to the needs of each Student. In those apparently rare cases where there is an additional individual BIP, it is not clear from the IEP if the DRS Procedures or the BIP is followed first.

9. This pattern of stereotypical behavior plans and LRE considerations is especially troubling given that Students have various disabilities, varying manifestations of problem behaviors, and evaluation information from FBAs and parental input not evident in educational planning.

10. The District Administration states that DRS staff are highly knowledgeable of the Students and their needs, and that effective intervention strategies occur without necessarily being pre-written in a conventional manner. This point is not disputed, but the weight of evidence shows that parents do not receive written procedures needed to allow them to be fully informed as to how and when regulated interventions are used with their children. The District is reminded

that parents have a right to unilaterally halt the use of interventions like seclusion time-out, and that a written FBA report and BIP are necessary sources of information. *See* Minn. R. 3525.2900, subp. 5.

11. Moreover, the use of the point and contract system when considered with the standard DRS Procedures lends additional support to a conclusion that Student IEPs are not sufficiently individualized.
12. The evidence revealed a clear lack of individual evaluation information (e.g. only 26 of over 150 Students have current FBAs). Without current FBAs for Students who were placed at DRS mainly because of behavior issues, it is difficult, if not impossible to develop appropriate IEPs or have sufficient information to adequately review and revise them on an individualized basis. The District's acknowledgement of "numerous concerns" and proposal to address them is important, however, the proposed corrective action will not be completed by winter break as the District initially indicated.

13. Minnesota Statute § 121A.67 requires the commissioner of CFL to adopt rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district. Specifically, the rules must:

    A. promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures;
    B. require that planned application of aversive and deprivation procedures be a part of an individual education plan;

C. require parents or guardians to be notified after the use of aversive or deprivation procedures in an emergency;
D. establish health and safety standards for the use of time-out procedures that require a safe environment, continuous monitoring of the child, ventilation, and adequate space; and
E. contain a list of prohibited procedures.

14. Conditional procedures are regulated procedures under Minnesota Rule and are defined in Minn. R. 3525.0200, subp. 1g to include:

A. aversive and deprivation procedures which are not prohibited;
B. the use of manual restraint;
C. the use of mechanical or locked restraint;
D. time-out procedures for seclusion; and
E. temporary delay or withdrawal of regularly scheduled meals or water not to exceed 30 minutes except as provided in subpart 2a.

15. Manual restraint is defined in Minn. R. 3525.0200, subp. 8e as:

> ... physical intervention intended to hold a pupil immobile or limit a pupil's movement by using body contact as the only source of physical restraint.

16. Minnesota Rule 3525.2900, subp. 5A provides that conditional procedures may only be used when:

...included as part of the pupil's IEP or in an emergency situation according to part 3525.0200. In order to utilize a conditional procedure, the IEP team must:

i. identify the frequency and severity of target behaviors for which the conditional procedure is being considered;
ii. identify at least two positive interventions implemented and the effectiveness of each; and
iii. design and implement regulated interventions based on present levels of performance, needs, goals and objectives, and document in the IEP.

17. Additionally, Minnesota Rule 3525.2710, subp. 4F, effective November 26, 2001, provides:

> Prior to using any conditional procedure, the IEP team must conduct a functional behavioral assessment (FBA) as defined in part 3525.0200, subpart 3a. The team must also document that it has ruled out any other treatable cause for the behavior, for example, a medical or health condition, for the interfering behavior.

18. Time-out for seclusion "involves procedures which place the pupil in a specially designated isolation room or similar space." Minn. R. 3525.0200, subp. 25b. The District used breakout rooms for "time out for seclusion." Apparently, Students are not locked while in seclusion. The District is commended for its

practice of allowing Students unlocked egress from breakout rooms.

19. The pervasive and very high number of breakout room use is troubling. CFL, in related correspondence to all school districts on the use of locked time-out for seclusion rooms, has previously clarified that, in general, the "seclusion of a Student in public schools is highly regulated because of its potential detrimental effect on the Student." CFL Policy Letter from Kermes and Hale, dated May 15, 2002. This memorandum also clarified the procedures districts must follow when using time-out seclusion rooms, whether locked or not.

20. The District asserts that because the breakout rooms were specifically included in "each" IEP, such use was proper. However, the weight of the evidence clearly shows that the inclusion of breakout room use into the Students' IEP was improper. Specifically, the use of the breakout room in the IEPs was not done on an individualized basis and was not done according to the individual needs of Students but in a universal manner to give the District blanket permission to confine Students. It is suspect to claim that virtually all Students require isolation in a breakout room, since this is an extraordinary form of intervention typically reserved for Students demonstrating extreme aggressive behaviors that will result in harm to persons or severe property damage.

21. Moreover, the file reviews and District's own reporting of the number of Students without existing FBAs contribute to the conclusion that the District

did not follow Minn. R. 3525.2710, subp. 4F (requiring an FBA) and Minn. R. 3525.2900, subp. 5A (requiring identification of target behaviors and two positive interventions, and specific regulated interventions) prior to using breakout rooms. While the District has proposed to address this situation in self-imposed corrective action, the District is not on track to completing its own proposed corrective action.

22. It is evident the District overused the standardized DRS Procedures and LRE statements without supplementing them with information on individual Students as required by 34 CFR § 300.346 and 34 CFR § 300.350.

23. Because the District did not sufficiently individualize the "DRS Procedures" for each Student, the use of the breakout room and manual restraint were only permissible in an emergency situation.

24. Minnesota Rule 3525.0200, subp. 2c defines emergency as:

> ... a situation in which immediate intervention is necessary to protect a pupil or other individual from physical injury, emotional abuse due to verbal and nonverbal threats and gestures, or to prevent severe property damage. The emergency intervention must be the least intrusive intervention possible to reasonably react to the emergency situation. This subpart does not prohibit staff persons from using reasonable force to protect themselves or other

pupils or students as provided in Minnesota Statutes, section 609.379.

25. Emergency interventions are governed by Minn. R. 3525.2900, subp. 5C, which provides:

> If an emergency intervention is used twice in a month or a pupil's pattern of behavior is emerging that interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional evaluation is needed, and, if necessary, to amend the IEP. Districts may use conditional procedures in emergencies until the IEP team meets, provided the emergency measures are deemed necessary by the district to protect the individual pupil or others from harm. The IEP team shall meet as soon as possible, but no later than five school days after emergency procedures have commenced. District administration and parents must be notified immediately when a regulated procedure is used in an emergency situation.

26. The District used the breakout rooms for time-out for seclusion in many different situations, some of which could be considered emergency situations (for example, threatening students or teachers, fighting, or kicking) but many that cannot be considered emergency situations. The evidence indicates that Students were placed in isolation rooms for being late to class, being on level 1 on the point system, for apparently minor inappropriate behavior (e.g. not following directions, swearing, not doing work, etc.),

refusing to sit in seat, walking out of class, being disruptive, being in the hallway, wanting to take a nap, taking things from other Students, and not listening. *See* also Issue #2.

27. The weight of the evidence establishes Students were placed in breakout rooms in non-emergency situations and breakout room use was not appropriately indicated in Student IEPs. Moreover, the evidence supports a conclusion that parents were not adequately notified when Students were isolated in breakout rooms.

28. There are some examples of staff interventions that constitute manual restraint. Manual restraint is included in the DRS Procedures contained in each Students' IEPs. However, because the DRS Procedures were not individualized and not specifically documented through the process outlined in Minn. R. 3525.2900, subp. 5A and Minn. R. 3525.2710, subp. 4F, these procedures were only permissible in an emergency situation.

29. There are some incidents where manual restraint was used in an emergency. For example, preventing a Student from running in front of a bus or to protect oneself from harm could be considered emergency situations. However, the weight of the evidence establishes Students were manually restrained in non-emergency situations, and the use of manual restraints was not appropriately indicated in Student IEPs.

30. Denying a pupil access to toilet facilities is a prohibited procedure which may not be used by

school district employees, contracted personnel, or volunteers. Minn. R. 3525.2900, subp. 5A(2). There is insufficient evidence that Students were denied access to toilet facilities.

31. At least 15 Students were isolated in the breakout room for over 2000 minutes in one school year. This is equivalent to being in the breakout room for more than five cumulative days, based on a six and a half hour school day. Six of these fifteen Students were in the breakout room for over 4000 minutes, or more than 10 cumulative days. Many of these Students were suspended as well, adding to the missed opportunity for instruction.

32. Federal regulation at 34 C.F.R. § 300.519 clarifies:

> For purposes of removals of a child with a disability from the child's current educational placement under Secs. 300.520-300.529, a change of placement occurs if--
>
> (b) The removal is for more than 10 consecutive school days; or
>
> (c) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

33. Continued and repeated use of the District's discipline policy, in this case suspensions and use of

breakout rooms, must be reviewed in conjunction with the development of an appropriate IEP for the Student. Minn. R. 3525.2900, subp. 5(B). *See also*, Inquiry of Fields, 211 Educ. Handicapped L. Rep. 437 (Office of Special Educ. Programs, U.S. Dep't of Educ., 1987) (as an Individuals with Disability Education Act matter, the Office of Special Education Programs "would encourage States and localities to be alert to the possibility that repeated discipline programs may indicate that the services being provided to a particular child with a handicap should be reviewed or changed").

34. The District may order the removal of a Student with a disability from the Student's current educational placement for not more than 10 consecutive school days for any violation of school rules. The District may order additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement. *See* 34 C.F.R. § 300.520.

35. Either before or not later than 10 business days after either first removing the Student for more than 10 school days in that school year or commencing a removal that constitutes a change in placement, the District has several obligations outlined at 34 C.F.R. § 300.520(b):

> (i) If the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in the

removal described in paragraph (a) of this section, the agency shall convene an IEP meeting to develop an assessment plan.

(ii) If the child already has a behavioral intervention plan, the IEP team shall meet to review the plan and its implementation, and, modify the plan and its implementation as necessary, to address the behavior.

(2) As soon as practicable after developing the plan described in paragraph (b)(1)(i) of this section, and completing the assessments required by the plan, the LEA shall convene an IEP meeting to develop appropriate behavioral interventions to address that behavior and shall implement those interventions.

36. As a learner with a disability, each student is entitled to receive a free appropriate public education (FAPE). 34 C.F.R. § 300.300(a).

37. After a Student with a disability has been removed from his or her current placement for more than 10 school days in the same school year, the District must provide services during any subsequent days of removal. These services must be provided to the extent necessary to enable the Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the Student's IEP. *See* 34 C.F.R. § 300.121(d).

38. Fifteen Students appear to have been removed from class by being placed on suspension and/or placed in the breakout rooms for more than 10 cumulative days. For example, Students #1, 3, 6, 7, 13, 15, 16, 17, 19,

21, 26, 27 28, 30 and 36 all appear to have been removed from class through breakout room use and/or suspensions for more than 10 cumulative days. The files of most of these Students do not appear to reflect the planning of an FBA, the review of the BIP, and the convening of the required IEP meeting in response to the change in placement. Moreover, there appears to be no indication the Students were provided with alternative education services following the change in placement for subsequent suspensions or placements into breakout rooms. It is inconclusive whether the accumulated removals over the year constituted a change in placement for these 15 Students, but it is at perilously close and implicates at least the requirement to provide services consistent with 34 C.F.R. § 300.121.

39. The District's labeling of the relationship between the District and the police liaison officer is not fully determinative. *See* Johnson v. Independent Sch. Dist. No. 535, 291 N.W.2d 699, 702 (Minn. 1980).

40. CFL initially requested "any documentation concerning the use of police liaison officers with Dakota Ridge Students." However, the District reported only 15 documented uses of the police liaison officer with Students. The file review revealed approximately 50 additional documented uses. This fact is troubling, as was the unavailability of secondary files of some Students who, according to the District's response, had involvement with the police liaison officer.

41. The District is ultimately responsible for the actions of its staff with regard to the implementation of the Student's IEP. If the District permits, enables, and/or assists a police liaison officer, even if separately employed by a law enforcement agency, to take action on educational interventions addressed, or which should be addressed, in the Student's IEP, the District does so at its own peril and may be held accountable for the result. *See* CFL Complaint File #1117 and CFL Complaint File #1489.

42. The District is not accountable for the police liaison officer's actions when acting in his law enforcement capacity. *See* CFL Complaint File #1618.

43. The District indicated, with regard to the police liaison officer, that:

    A. "any actions by the Dakota Ridge police liaison officer were law enforcement actions that were not subject to the Student's BIPs or the laws relative to the education of disabled students";
    B. "Police liaison officers are not District employees";
    C. "the police liaison officer is not an agent of the District and that he operates based upon his own initiative, judgment and discretion";
    D. "Police officers do not enforce school discipline policies or involve themselves in curricular matters";
    E. "[Police officers do not act as educational or related service providers for students with IEPs"; and

F. "[Police officers] serve a strictly law enforcement function."

44. Contrary to this position, a police liaison officer was specifically included into a Student's BIP.

45. Additionally, there is evidence that use of a police liaison officer was implicated in a variety of situations, including:

A. holding a breakout room door shut,
B. removing items from a Student in a breakout room,
C. staff requesting assistance from the officer,
D. searching Students and Student lockers,
E. the officer moving or escorting a Student to a breakout room, or
F. staff threatening truancy or trespassing charges.

46. Requesting help from a police liaison officer is an option that must be preserved for situations where police intervention is implicated. School district employees may report a crime committed by Students with disabilities to law enforcement officials. *See* 34 C.F.R. § 300.529. Such reporting is also consistent with the District's discipline policy.

47. However, contacting the police liaison officer in situations where there is no basis to suspect a crime or to report a crime or in non-emergency situations can have the effect of circumventing the policy of using positive approaches to behavioral interventions outlined in Minn. R. 3525.0850 and 34 C.F.R. § 300.346(a)(2).

48. Based on the available evidence, it is unclear whether each of the situations where the police liaison officer was used involved strictly law enforcement functions or if there was a basis to suspect a crime or to report a crime. Some situations clearly implicate legitimate law enforcement functions, however, the frequency of police liaison officer involvement also suggests overuse or over-reliance on the police liaison officer for educational interventions. When considered with a police liaison officer's inclusion into a BIP, it is clear there is some confusion and uncertainty at DRS as to when and how police liaison officers are used with Students in a law enforcement capacity.

49. Minnesota Rule 3525.0400 states:

> To the maximum extent appropriate, children with disabilities shall be educated with children who do not have disabilities and shall attend regular classes. A person with disabilities shall be removed from a regular educational program only when the nature or severity of the disability is such that education in a regular educational program with the use of supplementary aids and services cannot be accomplished satisfactorily. Furthermore, there must be an indication that the pupil will be better served outside of the regular program. The needs of the pupil shall determine the type and amount of services needed.

50. The District must make a continuum of alternative placements available to the Student. *See* 34 C.F.R. § 300.551(a).

51. Federal regulation at 34 C.F.R. § 300.550(b) states that the District shall ensure:

> (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and
>
> (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

52. Placement decisions are made "by a group of persons, including the parents. . ." 34 C.F.R. § 300.552 (a)(1). Moreover, the placement is "based on the child's IEP." 34 C.F.R. § 300.552 (b)(2).

53. Here, the District's implementation of the level system has implications for parental involvement in placement decisions and in the District's responsibility to offer a continuum of alternative placements. The weight of the evidence suggests that Students must proceed from level 1 to level 2 or 3 and must remain on level 2 or 3 prior to the District considering any mainstreaming opportunities. The use of the level system effectively removes the parent from the placement decision and unduly places seemingly sole emphasis on a Student's ability to control his or her own behavior, and is somewhat

dependant on how staff define and interpret Student behavior. The placement decision must be based on the Student's IEP and must be made by a group of people, including the parent. By conditioning eligibility for mainstreaming or for attendance in certain classes on maintaining behavior for six weeks is contrary to 34 C.F.R. § 300.552 and removes parental involvement under 34 C.F.R. § 300.552 (a)(1). This practice is even more troubling given that Students with many types of disabilities, including autism and developmental disabilities, and presumably many different capacities to control or understand their behavior, are enrolled at Dakota Ridge.

54. Minnesota Rule 3525.0850 provides guidance on the use of positive approaches to behavioral interventions:

> This policy is intended to encourage the use of positive approaches to behavioral interventions. The objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination. Behavioral intervention policies, programs, or procedures must be designed to enable a pupil to benefit from an appropriate, individualized educational program as well as develop skills to enable them to function as independently as possible.

55. Parents, staff, and Students reported that the level system is not effective with some Students. Many interviewees reported that Students who are on level 1 face little or no consequence for additional misbehavior. Moreover, interviewees report that since points which make up the levels can be lost easily, there is little incentive to try to get to another level. For Students whose behaviors have not been evaluated through an FBA or other evaluation information, whose IEPs do not reflect individualized approaches to addressing behavior, and who have various capacities to control or understand their own behavior, such a system would apparently have little pedagogical value and does not meet the expectations for positive interventions under Minn. R. 3525.0850.

56. Information was obtained from interviews with staff members, parents, and students which included both concerns and commendations for DRS. This information was subjective in nature, but it is evident there are some employment issues arising from the corrective action ensuing from File #1730. These are supervisory matters and not compliance issues, and the relevance to File #1760 is that the District is experiencing resistance from some DRS staff who prefer to rely on the past patterns of frequent use of seclusion and involvement of police. The District's proactive efforts to come into compliance with the state's behavior intervention rules requires DRS staff to change such patterns as the use of seclusion 50 to 100 times a year with a student, or reflective of a crime.

57. Education agencies must comply with the provisions of Minn. Stat. § 181.932 which prohibits an employer from discharging, disciplining, threatening, otherwise discriminating against, or penalizing an employee because an employee, in good faith, reports a suspected violation of any federal or state law or rule to CFL, or if CFL requests an employee to provide information during an investigation.

Decision

The District violated 34 C.F.R. § 300.350(a) and 34 C.F.R.§ 300.346(a)(2) when it did not tailor Students' IEP to the Students' individual needs.

The District violated Minn. Rule 3525.2900, subp. 5A and Minn. Rule 3525.2710, subp. 4F when it did not follow the appropriate procedures prior to placing Students in the breakout rooms.

The District violated Minn. Rule 3525.0200, subp. 2c when it used seclusion and manual restraints in non-emergency situations and where use of seclusion and manual restraint were not adequately addressed in the IEP.

While it is inconclusive whether the District violated 34 C.F.R. § 300.300(a) and 34 C.F.R. § 300.520(b) when suspensions and removals for breakout rooms created a change of placement for approximately 15 Students, the District did not provide continuing services as required under 34 C.F.R. § 300.121(d) for Students who were suspended following 10 cumulative days of removal.

The District violated 34 C.F.R. § 300.551(a), 34 C.F.R. § 300.552(a)(1), and 34 C.F.R. § 300.552 (b)(2) when it used the level system instead of the IEP process as a primary determining factor in the consideration of a continuum of alternative educational placements.

There is no apparent violation of state or federal law with respect to the use of a police liaison officer. However, the use of the police liaison officers is contrary to the District's stated position.

Corrective Action

See corrective action for Issue #2.

ISSUE #2

The Complainant alleges the District inappropriately placed Students at DRS in seclusion. Specifically, the Complainant alleges the District placed Students in seclusion without following the requisite procedures for including the use of seclusion in the Students' IEPs, using seclusion in non-emergency situations, documenting use of seclusion, and developing and following criteria for Students' return to routine activities.

Findings of Fact

1. Issue #1contains numerous relevant facts for Issue #2.

2. When Students enter breakout rooms, staff, typically pupil support assistants, fill out "recording sheets"

that provide a narrative summary of what happens when the Student is in a room. These recording sheets indicate Students were, for example, placed in time-out areas for:

- not wanting to do work;
- not wanting to be in same room as another student;
- not be able to go to physical education because of point levels;
- being disruptive in classroom;
- being late;
- being in the hallway;
- threatening a teacher;
- threatening a student;
- taking a paper away from a student and not paying attention;
- "per [DRS Administration]";
- "per [Teacher]";
- refusal to do work;
- wanting to take a nap;
- wandering around the room, talking during a movie, and drawing on board;
- fighting in the hallway;
- being extremely disruptive;
- refusal to go into classroom;
- kicking another student;
- stealing a marker while making a card;
- failing to return a cookie the student took from a table;
- stealing lunch from another student;
- taking another student's pie;
- walking out of class;
- being inappropriate and threatening;

- refusing to sit in seat;
- breaking contract or not having contract;
- pending investigation of other students;
- banging on walls, doors, and windows;
- going into wrong class, arguing, and provoking another student;
- not following orders;
- having a tantrum after being asked to give example of a noun;
- being angry with staff about bathroom breaks;
- being inappropriate to staff and students and not listening to the police liaison officer;
- being out of area and off task all week;
- being on ISS;
- kicking locker, swearing at staff, and being angry about a broken locker;
- being upset about a level drop and refusing to leave class;
- opening classroom door twice without permission;
- not doing work and being disruptive;
- slamming phone down;
- throwing a tantrum after being caught taking school papers home;
- taking three minutes to get to class and being verbally inappropriate;
- inappropriate language and being unable to handle assignment;
- refusing to put tennis shoes on or participate in physical education;
- misbehaving, not listening, and "showing attitude"; and
- having "too many marks to go to class."

3. In its response to this complaint, the District explained that many "of the documented [breakout room] times were true 'time outs for seclusion,' but many others were for purposes unrelated to a regulated conditional intervention." For example the District indicates Students can voluntarily request to go to the breakout room.

4. Parents uniformly indicated that the school did not inform them of how often their Students were placed in the breakout room during the 2001-02 school year. They also report that the school has started informing parents when Students are placed in the breakout room in the 2002-2003 school year.

5. In its response to this complaint, the District indicates the practice of sending Students to the breakout room during ISS was in place last school year but is not in place this school year. A separate room has been designated for ISS.

6. The District maintains it "developed and followed criteria for the return of students to routine activities" after Students are placed in seclusion. The District refers to a standard list of "suggested expectations" for return to class that is included on breakout room recording sheets.

Conclusions

1. Minnesota Rule 3525.2900, subp. 5D provides:

Time-out procedures that seclude a student in a specially designated isolation room or similar space must meet the following conditions:

1. specific criteria for returning the pupil to the routine activities and regular education environment;
2. an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;
3. provision for the pupil to be continuously monitored by trained staff;
4. adequate access to drinking water and to a bathroom for a time-out that exceeds 15 minutes;
5. documentation of the length of time spent in each time-out procedure and the number of occurrences each school day;
6. a safe environment for the pupil where all fixtures are tamper proof, walls and floors are properly covered, and control switches are located immediately outside the room;
7. an observation window or other device to permit continuous monitoring of the pupil;
8. a space that is at least five feet by six feet or substantially equivalent to these dimensions and be large enough to allow the pupil to stand, to stretch the pupil's arms, and to lie down;
9. be well-lighted, well-ventilated, adequately heated, and clean; and
10. all applicable fire and safety codes."

2. The breakout rooms generally appeared to have observation windows or other devices; have at least

the requisite size; be well lighted, ventilated, heated, and clean; and meet applicable fire and safety codes. There was also sufficient evidence that documentation contained the length of time students were in the breakout rooms.

3. The use the breakout rooms for hours at a time and for large cumulative totals is grievous. Moreover, if Students have been removed from instructional opportunities for discipline whether in the form of suspensions, in-school suspensions or breakout rooms, for over ten cumulative days, there may be a change in placement.

4. The investigation revealed a number of concerns with the breakout rooms.

   A. While some criteria are listed on recording sheets for returning the Student to regular activities, the recording sheets demonstrate that these criteria are not uniformly followed and are not necessarily specific to the individual student. The District did not follow appropriate individualized criteria for returning students from the breakout room to routine activities.

   B. The District did not show that all requirements of Minn. R. 3525.2900, subp. 5D were met. For example, the District did not show it conducted an evaluation to determine whether seclusion was contraindicated for Students who were put in the breakout room. In fact, the District only provided documentation of 26 FBAs, which may or may not include this determination. The results of the FBAs did not appear in the

standard DRS Procedures used or in any BIP, or were otherwise reflected in student IEPs. The weight of the evidence indicates that Students were not evaluated to determine whether seclusion was contraindicated for psychological or physical health reasons prior to the use of time-out for seclusion, or if such an evaluation had taken place, the evaluation findings, in whole or part, were not included in Students' BIPs. Additionally, the District did not show that all requirements of Minn. R. 3525.2710, subp. 4F and Minn. R. 3525.2900, subp. 5A were met prior to including the use of breakout rooms or prior to placing Students in the breakout rooms in non-emergency situations.

C. Pupil support assistants, who generally are assigned to monitor the breakout rooms, indicate they have not had specific training on monitoring. Additionally, there is sufficient evidence to establish that certain staff members were denied access to IEPs, in violation of 34 C.F.R. § 300.342(b)(2).

D. The recording sheets suggest that Students may not access the bathroom or drinking water unless they "sit quietly" for a certain time period, usually, but not always five minutes. It is unclear whether staff actually give access if the Student is not quiet for five minutes, or for the certain time period. There is evidence that Students indicate they need a drink or need the bathroom when they may not actually need them. However, there is also evidence that some Students were not allowed access for extended time periods. There is not a preponderance of

evidence to establish Students were denied adequate access to facilities.

E. Some breakout rooms do not have tamper proof or safe areas. One recording sheet indicated a Student in a breakout room continually tried to stick his fingers in an electrical outlet. There is no evidence the Student was harmed.

Decision

The District violated Minn. R. 3525.2900, subp. 5(D) in its use of the breakout rooms.

Corrective Action for Issues #1 and #2

1. The District's proposed actions are accepted in part. For further guidance on its corrective action, the District is directed to contact [Due Process Specialist], who is assigned to follow up on this matter.

2. The District does not appear to be able to complete all FBAs by winter break. As of the date of this decision, only 14 out of the school population of over 100 are scheduled. Within 30 days from the date of this decision, the District must provide CFL with a revised and prioritized schedule of when parents will be contacted to propose FBAs and expected dates of completion to CFL for approval. The District must include the following information for each Student:

   A. the date of the most recent FBA, if any;
   B. whether or not the current FBA supported the use of specific conditional procedures;

C. identification of which specific conditional procedures are permitted or not allowed;
D. the date of the proposed FBA;
E. the staff members who are responsible for managing the completion of the FBAs;
F. the expected date of completion;
G. when the Student's IEP is being reviewed or revised in the 2002-03 school year; and
H. a general description of what parts of the IEP were actually revised (e.g. BIP, Goals, Present Levels of Performance, etc.).

NOTE: Importantly, this decision does not forbid or restrict the use of breakout rooms in emergency situation or where appropriately indicated in the Students' IEPs. This decision is designed to ensure the use of breakout rooms is included in IEPs and appropriately used. Further, the District is advised that the isolation of Students is a highly intrusive intervention meant to be used for highly aggressive behaviors that are likely to result in harm to persons or property. This decision does not rule out the use of isolation that is self-selected by Students to calm themselves, but such use in still regulated at Minn. R. 3525.2900, subp. 5.

3. The District must provide a copy of this decision to all DRS staff members, including teachers and pupil support assistants within 10 days of the date of this decision. The District must provide a list of staff members who were issued a copy of this decision to CFL by January 19, 2003.

4. The District must provide copies of this decision along with a copy of CFL's special education complaint resolution process to all parents of Students at DRS in the 2001-02 school year and submit verification of compliance to CFL by January 19, 2003.

5. By January 19, 2003, the District must schedule training to DRS staff and administrators, including teachers and pupil support assistants, to be conducted by CFL at no cost or a CFL-approved independent trainer in each of the areas identified in the Decision section. This training must be conducted prior to the first day of classes for the next school year.

6. The District has initiated assistance from an independent expert to develop written policies and assist in conducting FBAs. The District is commended for its proactive effort and its choice of expert is approved. Written policies are required in the following areas by the beginning of the next school year:

   - breakout rooms;
   - positive behavioral supports;
   - ISS rooms or sensory rooms;
   - police liaison officer use;
   - level system;
   - contracts with Students; and
   - fees charged to Students.

7. The development of these policies must include documented input from District administration, building administration, teachers, pupil support assistants,

parents, and Students by May 30, 2003. The District must provide a draft of these completed policies prior to distribution for CFL approval along with how and in what manner administration, teachers, pupil support assistants, parents and Students were involved. These policies must include some provision for annual review and continued input from all groups identified in this paragraph. A representative of the county police department must be contacted for input into the drafting of the policy concerning use of the police liaison officer. These policies must be submitted to CFL for approval by January 16, 2003.

8. CFL will conduct a special focus monitoring on the corrective action plan identified in this decision.

9. For Students #1, 3, 6, 7, 13, 15, 16, 17, 19, 21, 26, 27 28, 30 and 36, the District must provide CFL with documentation of the total number of times and duration of time the Student missed instruction and services due to being in the breakout rooms, suspensions, or other disciplinary related consequences in order to determine if a change in placement and subsequent loss of FAPE occurred. Additionally, the District must propose specific corrective action to CFL with regard to these Students to CFL by January 19, 2003 in those cases where Students were not able to access FAPE for 10 or more cumulative days due to being in the breakout rooms, suspensions, or other disciplinary related consequences.

The authority to review complaints is given in the federal regulations to the Individuals with Disabilities Education

Act (IDEA), 34 C.F.R. §§ 300.660-.662. Questions about this decision should be directed to the complaint investigator, [Investigator]. If the Complainant has subsequent concerns about the District's implementation of the corrective action, he/she should contact due process specialist, [Due Process Specialist].

Sincerely,

Thomas J. Lombard, Ph.D.
Assistant Commissioner
Office of Special Education

Complaint File #1730
September 19, 2002
Rosemount-Apple Valley-Eagan ISD #196

Dear Superintendent and Complainant(s):

This letter is to inform you of the findings of the complaint entered by [Complainant] on behalf of [Student], a resident of Independent School District #196 (District). What follows is the report of the investigation, the issues, findings of fact, conclusions of law or rule, and order, where applicable. [Investigator] coordinated the investigation.

Issue #1 and #2 have been combined for organizational purposes.

ISSUE #1

The Complainant alleges the District used aversive and deprivation procedures, including restraint, seclusion, and handcuffs by a police liaison officer, without following the proper procedures.

ISSUE #2

The Complainant alleges the District failed to develop an appropriate behavior intervention plan (BIP) for the Student. Specifically, the Complainant alleges the District utilized the police liaison officer in lieu of an appropriate behavior plan or as part of the District's response to the Student's behavior.

Findings of Fact

1. The Student is age 16 and has recently completed ninth grade at Dakota Ridge School (DRS). He is a resident of the District. The Complainant is the Student's father.

2. The District determined the Student to be eligible for, and in need of, special education services by meeting the eligibility criteria for moderate to severe mentally impaired (MSMI); emotional behavioral disorders (EBD); and, speech/language impaired (SLI). Other documentation indicates the Student is disabled due to Fetal Alcohol Syndrome (FAS).

3. DRS is a Federal Setting IV program. It provides educational services for students with significant emotional behavioral needs in grades kindergarten through 12. Approximately 130 students attend DRS at any time.

4. The Student had open-enrolled into Lakeville ISD #194 and attended McGuire Junior High School during the 1999-00 school year. It was reported by the Student's classroom teacher that the Student was manually restrained one or two times during the 1999-00 school year. Time-out for seclusion was not used although the Student was allowed to go to another

room which had activities and support staff to assist in calming him down when necessary. The police liaison officer was called to assist with the Student's behavior on one occasion near the end of the 1999-00 school year. The Student was not handcuffed.

5. The Student attended DRS during the 2000-01 and 2001-02 school years.

6. The Complainant states:

> I don't have much paperwork from the school on the 2000-2001 school year although the services there were also inappropriate. During that year, [Student] was constantly begging me to get him out of that school. I made many requests to get appropriate services for him to no avail. His trauma seemed to escalate latter November and December 2000. One day he seemed to just have the equivalent of a nervous breakdown. He just wandered around without really much awareness of what was going on around him. He would speak of inanimate objects talking to him and was incoherent much of the time. Though I probably cannot prove this I am sure it was stress caused by Dakota Ridge school. After we pulled him out for an extended period he seemed to improve

> some although he has not regained many of the functions he had before then. After he retuned [sic] to school his stress seemed to get worse again. This past school year [2001-02] his behavior seemed to escalate the more they used the deputy for behavioral intervention. The longer it has been since he has been away from that school the more relaxed he seems to be and his behaviors are minimal compared to what they had at school. It should be noted also that during that span of time his behaviors at home were less than what the school reported and I believe most of the behaviors were in fact accelerated by Dakota Ridge's incompetence at dealing with his disabilities. . . . I hope the truth will be realized so that we can end the kinds of abuse which [Student] has endured. No one should have to go through what he has gone through.

7. On August 11, 2000, the Student's IEP team met and agreed upon an IEP for the Student (IEP #1).

8. The Adaptations in General And Special Education Section of IEP #1 states, in part:

> [Student] is expected to follow the district discipline policy, however, suspension will be

evaluated on an individual basis with a reduced number of days given, which may deviate from the district recommendations.

9. Appendix A, attached to IEP #1, notes:

STUDENT STRENGTHS
[Student] is very creative. He has lots of different interests and enjoys trying new things.

EDUCATIONAL CONCERNS
Mom is concerned about [Student] stealing. He also needs to be restrained at times. [Student] sometimes touches inappropriately sexually. It should also be noted that [Student] has been diagnosed with FAS (Fetal Alcohol Syndrome) and has a cyst growing on his brain.

DRS PROCEDURES FOR DEALING WITH [STUDENT'S] DISRUPTIVE BEHAVIOR
In the Event of a Conflict with a Peer:
Adults will monitor and intervene quickly if students are unable to resolve a conflict on their own.

1. Depending on the situational factors, and the threat to safety for staff and student, options

will be given to [Student] for coping with the situation:

a. Conflict mediation:
b. Ignoring peer:
c. Removing self from the situation, like use of a breakout room or alternative seating arrangement;
d. Getting involved in an alternative activity;
e. Offer [Student] the opportunity to talk to an adult in the program whom student identifies as a support person;
f. Offer [Student] the opportunity to talk to his parent (or other adult parent has approved) by phone.

2. Remove other children from the situation to help deescalate it. The student(s) who are being appropriate and accepting adult intervention will be the ones who will be removed to a safe area.
   This procedure is used to prevent the need for the use of restraint.
3. [Student] will be sent home if none of the above procedures are working and there appears to be a risk that the situation will escalate. This will only be used if there is concern for safety of students or damage to property. This procedure would be used to

prevent behavior from occurring that would likely result in suspension.

4. A suspension would result if:
   a. [Student's] behavior presented a danger to himself or other students or the staff;
   b. No interventions by the staff were effective;
   c. Staff needed time to review and adapt procedures, if needed to prevent future occurrence of problem
5. Restraint will be considered as a possible intervention in a situation deemed an emergency, in which [Student's] behavior places himself or others in danger. The restraint must be able to be done in a way that is considered safe to [Student], and staff, and when there are no other options available for dealing with the crisis

10. The Least Restricted Environment (LRE) Justification Section of IEP #1 provides, in part:

> DRS provides a planned reinforcement system/point system. Behavior monitoring and feedback to students are also provided. DRS offers intense supervision, verbal reinforcement and behavioral support.

11. Per the Complainant's request, the Student's IEP team reconvened on December 4, 2000. Among other proposed changes to the IEP, Appendix A was modified to read as follows:

> [STUDENT] IS EXPECTED TO FOLLOW THE DISTRICT DISCIPLINE POLICY, HOWEVER, THE FOLLOWING BEHAVIOR PLAN/PROCEDURE WILL BE USED FOR DISRUPTIVE BEHAVIOR:
>
> All of the following are activities that can be used to 'defuse' a situation.
>
> 1. Conflict mediation.
> 2. Access to the following people
>   a. Building principal
>   b. PSA
>   c. Social Worker
>   d. School psychologist
>   e. Lead Teacher
> 3. [Student] may ask to use the break-out space.
> 4. Staff will ask [Student] to use the break-out space in the following manner-
>   [Student] will sit in a desk in the break-out room facing away from other students for 5 minutes without getting up or disrupting other students. This will be monitored by the

use of a timer, and the 5 minutes will be reset if disruption or movement occurs.

5. When [Student] wants to use the phone to call his mother, he will be allowed to do so as long as he is under control of his behavior and not yelling, hitting, kicking, or destroying property. [Private therapist] may also be called if mother is unavailable.
6. If the above steps are unsuccessful, suspension may be used.
7. Appropriate restraint techniques may be used if [Student] is hurting himself, school property, or other people.

12. DRS has several rooms called "breakout rooms." The breakout rooms appear well lit, well ventilated, and clean. They are at least five feet by six feet in dimension. Several breakout rooms are adjacent to classrooms. The breakout rooms are locked from the outside and require a key to enter, but are not locked from the inside. All breakout rooms have an observation window.

13. Both parties agreed that "appropriate restraint techniques," as described in paragraph seven of the Student's BIP, included the use of manual restraint.

14. On December 13, 2000, the Complainant signed the Notice of Proposed Special Education Services form indicating he needed further information prior to consenting to the IEP proposed on December 4, 2000 IEP.

15. On December 15, 2000, a teleconference IEP team meeting was conducted. However, there is no documentation in the Student's file pertaining to the topics covered during the December 15, 2000 teleconference.

16. On January 10, 2001, and again on January 30, 2001, the District forwarded the proposed IEP to Complainant seeking parental review and consent. On February 1, 2001, the Complainant consented in writing to this IEP (IEP #2).

17. On April 20, 2001, another teleconference IEP meeting was conducted. However, a revised IEP was not forwarded to the Complainant for signature until August 16, 2001. In the meantime, the Student's IEP team reconvened on May 16, 2001, and the parties agreed to have the Student receive homebound services five hours per week.

18. On May 10, 2001, a meeting was held to develop an evaluation plan for the District to conduct a functional behavioral assessment (FBA) on behalf of the Student. Specifically, the materials and procedures to be utilized were proposed to be: "Observations, Parent/Staff/ Student Interviews/Record Review." The Complainant gave permission for the FBA on May 13, 2001. Accordingly, the evaluation completion due date was September 20, 2001.

19. During the 2000-01 school year, DRS utilized behavior point sheets for the Student. The point sheets outlined the class periods and documented the behavior of the Student. Also noted was whether the Student used the breakout room. The point sheets for the Student used, during the 2000-01 school year, were not sent to the Complainant. It should be noted that the point sheets were "cut" and then photocopied prior to being provided to CFL. The following table summarizes the information ascertained from the altered point sheets provided by the District.

Date	Length of Time In Breakout Room
9-13-00	Not documented
9-27-00	Two times Not documented
10-11-00	During lunch
10-25-00	Last hour
10-26-00	One hour in a.m. and "afternoon"
10-27-00	"a.m."
11-22-00	Not documented
12-11-00	10 minutes 5 minutes
1-18-01	10:30-1:15
3-15-01	9:30-1:30 2:45-3:30
3-16-01	9:10-12:30 12:52-1:30 2:45-3:30
5-14-01	Not documented

20. Documentation that the Complainant was notified when the Student was sent to the breakout room was found for the following dates: September 27, 2000; October 25, 2000; November 22, 2000; and March 15, 2001.

21. There is no documentation, and the Complainant was not able to provide any specific incidents, of manual

restraint used on the Student during the 2000-01 school year. However, several DRS staff report that "on occasion" manual restraint was used on the Student during the 2000-01 school year.

22. No evidence suggested the Student was placed in handcuffs during the 2000-01 school year.

23. The Student received nine bus conduct reports for inappropriate bus behavior during the 2000-01 school year.

24. The Student received one day of suspension and two days of in-school-suspension (ISS) during the 2000-01 school year.

25. At the beginning of the 2001-02 school year, on September 5, 2001, an IEP team meeting was held. In response to the meeting, the Complainant proposed additional changes he wanted incorporated into the Student's IEP and BIP.

26. It is unclear when the IEP developed as a result of the September 5, 2001 IEP team meeting was sent to Complainant for signature as the date on the notice reads August 16, 2001, which is prior to the meeting.

The Complainant consented to the subsequent IEP on November 6, 2001 (IEP #3).

27. Under the Transition Service Needs – Community Participation, IEP #3 reads:

> [Student] needs to learn how to interact within the guidelines established for the activity he is participating in, and he needs to communicate with friends and peers in an appropriate social manner. [Student] needs an aide to be with him at all times who is trained in dealing with FAS and is physically able to restrain his behavior.

28. The Adaptations in General and Special Education Section of IEP #3 provides:

> Curb to curb transportation will be provided within ISD #196 to school in an adaptive bus with low ridership. Seat belts are needed, as [Student] gets overstimulated with lots of other riders and gets to where he cannot control his actions. The seat belt will keep [Student] restrained so that he cannot act impulsively towards other passengersor [sic] staff. The bus chaperone should be in close proximity to [Student] for monitoring. A class of reduced size staffed with a

teacher who [sic] has received training in Fetal Alcohol Syndrome and a one-on-one aide who is also trained to work with FAS individuals will be provided. All staff who have responsibility for teaching or disciplining [Student] will be trained in working with individuals with Fetal Alcohol Syndrome/Effects. When training is done in FAS techniques, [Student's] parents are to beinvited [sic] to attend with the staff. Curricular materials will be adapted to meet [Student's] instructional needs. A visual schedule will be given to [Student]. Physical activities need to be monitored due to brain cyst. SEE APPENDIX B.

29. Appendix B to IEP #3, states:

THE FOLLOWING BEHAVIOR PLAN/PROCEDURE WILL BE USED FOR DISRUPTIVE BEHAVIOR AND TO AID IN PREVENTION OF THESE BEHAVIORS:

All of the following are activities that can be used to "defuse" or prevent a situation.

1. [Student] needs continual reinforcement. Rewards for appropriate behavior should be given within a three hour time span. Discipline should also be given as quickly as

possible – at least within 3 hours (preferably sooner).

2. NEVER should rewards or discipline be held over to the following day. [Student's] ability to grasp abstract processes does not let him understand when these things are delayed. [Emphasis in original.]
3. His social achievements and deficiencies should be discussed with him, at a minimum, at the end of each day.
4. The teacher and SSA should be looking for signs of stress and should encourage [Student] to go to an isolated setting and work on individual activities when he gets stressed. [Student] has brain damage and often cannot control his behaviors, especially when he gets stressed. His goals should NOT take priority over letting [Student] get overstressed. [Emphasis in original.] His handicap does not allow him to be able to handle a lot of stress. The teachers and SSA may do brush therapy (as indicated during FAS training and suggested by psychologists), and shoulder massage may be used on [Student], especially when he starts getting aggravated, as this

oftentimes helps to calm him down when early warning signs of stress are present.

5. [Student's] day should be structured with little change in routines except as is absolutely necessary or caused by stress.
6. [Student] should be informed of upcoming events and changes in activities, preferably with a visual schedule and verbal warning 15 minutes before a change in activity.
7. Before confronting [Student] in a situation, staff should attempt to understand what [Student] perceives of the situation. Most often when [Student] gets extremely agitated it is because he was accused of something that he did not, in his mind, think he had done or similar misunderstandings.
8. Conflict mediation between [Student], the other person/people involved, and a staff mediator.
9. [Student] will have access to the following people:
    a. EBD Coordinator
    b. School Social Worker
    c. School Psychologist
    d. Lead Teacher
    e. Lead Teacher

10. [Student] may ask to use the break-out space.
11. Staff will ask [Student] to use a break-out space in the following manner –
    a. [Student] will sit in a chair facing away from other students for 5 minutes without getting up or disrupting other students. This will be monitored by the use of a timer, and the 5 minutes will be reset if disruption or movement occurs. When he is initially asked to go to time out, a timer will be started for 5 minutes and his actions, as long as they are not hurtful to himself, others or to property, will be ignored. If he hasn't gotten himself to a time-out position within 5 minutes, an additional time out will be added.
12. When [Student] wants to use the phone to call his mother or father, he will be allowed to do so, as long as he is under control of his behavior and not yelling, hitting, kicking, or destroying property. If his behavior is out of control, he may be required to call using a speaker phone which he cannot touch.

[Private therapist] may also be called if he desires.

13. If the above steps were unsuccessful, he may be removed from school and a meeting of appropriate individuals will set a meeting [sic] as quickly as possible to discuss alternative methods or settings to assure that the needs of [Student] and the district are protected.
14. Appropriate restraint techniques may be used if [Student] is hurting himself, school property, or other people. [Emphasis in original.]
15. [Student] will have a "safe space" when he is irritated.
16. Dad requests that [Student] be allowed to chew gum at school to alleviate anxiety so he is better able to concentrate (as is done with the FASD Kids at Thunder Spirit Lodge before sessions).

30. Both parties agree that "appropriate restraint techniques," as described in paragraph 14 of the Student's BIP, included the use of manual restraint. Neither party contends that appropriate restraint

techniques included the use of the police liaison officer or the use of handcuffs.

31. During the 2001-02 school year, the Student did not attend school on Wednesdays; on the remaining school days each week, he was scheduled to arrive at school later in the morning than the opening school bell times.

32. The District contends:

> The BIP that was in place for the Student was a thorough BIP that was carefully and painstakingly developed with the parents . . . The BIP neither prohibits nor requires police involvement and the District did not use its police liaison officer as a substitute for the BIP. The District followed the requirements of the BIP and the police liaison officer only became involved in incidents when the Student was placing others in physical peril and a law enforcement response was more appropriate than an educational response.

33. However, it was reported by several DRS staff that the five-minute time-out found in paragraph 11 of the Student's BIP was "not done very often." Additionally, one staff person explained that the five-

minute time-out occurred in the classroom, another reported that the five-minute time-out occurred in the breakout room and/or that the five-minute time-out was necessary for the Student to exit the breakout room.

34. IEP #3 was in effect for the Student until he started receiving homebound services in February of 2002. Documentation in the Student's file indicates that an IEP team meeting was next held on February 21, 2002.

35. The Student's FBA was completed on September 20, 2001. A notation in the Student's file indicates that on September 24, 2001, the FBA report was mailed to Complainant. The Complainant contends he did not receive a copy of the FBA conducted by the District and there is no evidence that the parties met to discuss the contents of the September 20, 2001 FBA.

36. In December 2001 and January 2002, a District school psychologist conducted two classroom observations of the Student that were "requested primarily as a result of [Student's] increasing behavioral difficulties." There is no evidence the Complainant was informed of these observations and

the Complainant contends this information was not shared with him nor discussed at an IEP team meeting.

37. In early January of 2002, the parties agreed that an FBA be conducted by an outside agency due to the Student's increasing aggression at DRS. An evaluation plan for this FBA was not found in the District's records nor was there evidence the original evaluation plan was amended as a result of this agreement.

38. On January 27, 2002, the outside FBA report was completed, this FBA report states "[i]t would be expected that Student becomes further escalated as a result of ongoing apprehension regarding physical counter-aggression from the deputy and other staff."

39. January 24, 2002, was the last day the Student attended DRS. The Complainant thereafter withdrew the Student from DRS.

40. During the 2001-02 school year, DRS began using "Time-Out/Seclusionary Room Recording Sheets" (Recording Sheets) to document the use of the breakout rooms. These Recording Sheets have a

specific space for the "start time" and "end time" a student enters and leaves the breakout room.

41. According to the Recording Sheets and the police liaison officer's Incident Reports (Incident Reports), conditional procedures were used with the Student at the following times from September 2001 through January 24, 2002:

Date	Length Time In Breakout Room	Manual Restraint Used and Number of Persons Used to Restrain	Police Liaison Office Involved	Handcuffs Used
9-18-01	28 minutes			
9-28-01	31 minutes		Yes	
10-09-01	60 minutes	Yes "Escort"	Yes	Yes
10-09-01	60 [ten minutes later]	Yes Four people	Yes	
10-29-01	50 minutes		Yes	
11-06-01	55 minutes			
11-06-01	30 minutes	Yes Four people	Yes	Yes
11-12-01	150 minutes	"Escorted"	Yes	
11-13-02	Not documented	Yes Five people	Yes	Yes
11-20-01	275 minutes	Yes Five people	Yes	
12-03-01	75 minutes	Yes Three people	Yes	Yes Also Flex Cuffs & Spit Sack

12-06-01	30 minutes			
12-07-01	72 minutes	Four people "escorted"	Yes	
12-07-01	170 minutes	Three people "escorted"	Yes	
1-04-02	120 minutes	Yes Three people	Yes	Yes
1-07-02	216 minutes	Yes Four people	Yes	Yes
1-14-02	90 minutes	Yes Four people	Yes	Yes
1-23-02	60 minutes	Yes	Yes	Yes

42. The Student was isolated in the breakout room during the times documented on Recording Sheets.

43. It was reported by DRS staff that sometimes the Student was allowed to leave the breakout room once he "calmed down," other times after being calmed down for five minutes, and other times after being calmed down for ten minutes.

44. It was further reported by DRS staff that if the Student attempted to leave the breakout room prior to being "calm," DRS staff or the police liaison officer would hold the door shut from the outside, i.e., place their foot and/or hand against the door to prevent the Student from leaving the breakout room.

45. It is also documented that when the Student was in the breakout room, on at least four occasions,

November 20, 2001; December 3, 2001; January 4, 2002; and January 14, 2002, the door handles on the inside of the breakout room were removed.

46. Both the Recording Sheets and DRS staff report that while the Student was in the breakout room, he was continuously monitored.

47. On November 20, 2001, the Reporting Sheet notes that at 12:35 the Student was given his lunch and told he would be taken to the bathroom "when he could sit & be appropriate." At 1:40, it is documented that the Student was taken to the bathroom.

48. The Student left DRS early on at least two occasions, October 9, 2001, and December 3, 2001, as a result of his behavior. Specifically, on at least these two occasions the Student's parents were contacted to pick the Student up from school early due to the nature of his behaviors.

49. The EBD coordinator states the Complainant was contacted, via telephone, each time the breakout room, manual restraint, and/or handcuffs were used. Documentation of the Complainant being notified was found for December 3, 2001; January 4, 2002;

and January 23, 2002. The Complainant contends he was not contacted any other time.

50. DRS staff report that the Recording Sheets were not sent home. The Complainant contends the first time he knew of these sheets was when his advocate requested a copy of the Student's file from the District during the summer of 2002.

51. The physical aggression displayed by the Student included kicking, shoving, hitting, nudging, and on at least one occasion, choking. These behaviors were directed towards the Student's paraprofessional, lead teachers, other staff and also the police liaison officer. For examples:

    A. Recording Sheet dated January 4, 2002, "...force was needed to get him into [breakout] room. [Student] tried to choke the [police liaison officer];"
    B. Recording Sheet dated January 14, 2001 "we tried to get [Student] calm & tell us what he wanted to do. [Student] just got physical. [Student's paraprofessional] was kicked twice & punched once in the stomach. He pushed [lead teacher] twice & grabbed his [student]

neck. [Police liaison officer] was kicked in the groin."

52. The Reporting Sheets show most of the property destruction by the Student occurred while he was told to go to the breakout room or actually in the breakout room. For example, Recording Sheet dated September 18, 2001, provides "[Student] finally went in [breakout room] and started throwing the desk around and kicking the door."

53. The Reporting Sheets indicate and DRS staff report that both the Student and DRS staff obtained bruises, scrapes, and/or red marks during the course of addressing some of the Student's behaviors.

54. The Student reports to the complaint investigator that he did not like attending DRS. Specifically, when asked to describe DRS he states, "...hold me down . . . handcuffs." Further, he indicates he did not like the breakout room; a place he went to by himself when he did "not behave."

55. The District's discipline policy, "The Overview of Student Rights and Responsibilities, 2001-02 School Year," at page 11 provides:

> Administrators may involve law enforcement authorities as necessary. If a student violates a district policy or regulation, which is also a violation of a law, the student will be referred to the police in addition to being dealt with as described here.

56. The school police liaison officer at DRS for the 2001-02 school year was contracted through the Dakota County Sheriff's Department.

57. Pursuant to the contract, the District pays the County "an amount equal to 75% of the cost of the salary and benefits for the officer provided." Additionally, the District provides the "work space . . . office furniture, telephone, utilities, computer access and clerical support and supplies." While the County provides training for peace officer licensing, uniforms, and "other supplies and services customarily provided for deputies in the Dakota County Sheriff's Office."

58. According to the "General Duty Deputy School Police Liaison Deputy" document provided by the Dakota County Sheriff's Department, the school police liaison officer's duties and responsibilities are as follows:

These examples do not include all possible tasks in this work and do not limit the assignment of related tasks in any position of this class.

- Provides security for students and staff.
- Assists school officials in responding to unusually disruptive behavior.
- Takes statements regarding misdemeanors and completes police reports.
- Facilitates communication and cooperation with county juvenile authorities, local police officials, and members of the professional community.
- Assists the school staff in understanding the Dakota County Juvenile Court System, law enforcement issues, and the court referral process.
- Provides an in-house law enforcement source for school staff and students in processing criminal matters.
- Provides training to students and staff regarding legal issues, crime and drug prevention, and delinquency programs.
- Serves as a role model and endeavors to build rapport with students and staff."

59. The District contends:

> Police liaison officers are not District employees. They are employed by local law enforcement agencies. In the case of the officer assigned to Dakota Ridge, he was employed by the Dakota County Sheriff's Office. . . Please note that the contract makes it clear that the police liaison officer is not an agent of the District and that he operates based upon his own initiative, judgment and discretion. The contract clearly provides that the officer is trained by the Sheriff's Office and is present in the school for purposes of providing law enforcement services.

60. The District contends:

> Any actions by the school's police liaison officer were law enforcement actions that were not subject to the Student's BIP or the laws relative to the education of disabled students.

61. The police liaison officer informs that he did increase his "patrol" around the Student as he became more aware of the Student's tendency towards needing intervention. The police liaison officer also attended various classes with the Student's class, e.g., physical education class.

62. The EBD coordinator contends the staff at DRS never called the police liaison officer to assist them with any situation involving the Student. In contradiction, the staff as well as the police liaison officer report times where the police liaison officer was specifically called to assist them in handling a behavioral situation with the Student. In fact, it is documented that at least on three occasions, November 13, 2001; January 4, 2002; and January 23, 2002; DRS staff specifically requested the police liaison officer to assist in handling the Student's behavior. On all three occasions, the Student was placed in the breakout room and in handcuffs.

63. The Recording Sheets indicate, and DRS staff report, that DRS staff were present during the duration of the police liaison officer's interventions involving the Student. DRS staff assisted the police liaison officer in manually restraining and placing handcuffs on the Student. For example:

    A. Recording Sheet dated October 9, 2001, provides, in part, "[a]fter he picked up his shoe and threatened to use it to hit [police liaison officer] and [EBD coordinator] we had no choice but to restrain him. When he calmed down we took the restraints off and he agreed to do his five minute time out;"

B. Recording Sheet dated December 3, 2001, provides, in part, "[h]e spit towards [EBD coordinator]. After, [police liaison officer's] & [EBD coordinator's] instruction we restrained [Student] with handcuffs, foot restraints & spit bag. We took off all handles because he was opening all breakout room doors banging all doors with feet, head. We took all restraints off. He hit his head hard on the glass so we had no choice but to put handcuffs on again."

C. Recording Sheet dated January 14, 2002, provides, in part, "[police liaison officer] took over and restrained [Student] w/handcuffs. W/instruction from [police liaison officer], [lead teacher], [another lead teacher], [Student's assistant] helped restrain."

64. In January 2002, the Dakota County Sheriff's Department started filing charges against the Student. Specifically, the police liaison officer filed assault in the fourth degree charges for the incidents occurring on January 4, 2002; January 7, 2002; January 14, 2002; and January 23, 2002.

65. The District requested that the Sheriff's Department not go forward with the charges, but to no avail.

66. The court dismissed the criminal charges due to the Student's incompetency.

Conclusions

1. Federal regulation at 34 C.F.R. § 300.662 requires the state educational agency to investigate complaints alleging violations occurring up to three years for allegations of continuing violations.

2. School districts are responsible for implementing a student's IEP, including any BIP incorporated into the IEP, as written. *See* 34 C.F.R. § 300.350(a).

3. Minnesota Statute § 121A.67 requires the commissioner of CFL to adopt rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district. Specifically, the rules must:

    A. promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures;
    B. require that planned application of aversive and deprivation procedures be a part of an individual education plan;

C. require parents or guardians to be notified after the use of aversive or deprivation procedures in an emergency;
D. establish health and safety standards for the use of time-out procedures that require a safe environment, continuous monitoring of the child, ventilation, and adequate space; and
E. contain a list of prohibited procedures.

4. Accordingly, Minn. R. 3525.0850 provides guidance on the use of positive approaches to behavioral interventions:

> This policy is intended to encourage the use of positive approaches to behavioral interventions. The objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination. Behavioral intervention policies, programs, or procedures must be designed to enable a pupil to benefit from an appropriate, individualized educational program as well as develop skills to enable them to function as independently as possible.

5. Federal regulation at 34 C.F.R. § 300.346(a)(2) requires the district to:

> In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive interventions, strategies, and supports to address that behavior.

6. Conditional procedures are regulated procedures under Minnesota Rule and are defined in Minn. R. 3525.0200, subp. 1g to include:

   A. aversive and deprivation procedures which are not prohibited;
   B. the use of manual restraint;
   C. the use of mechanical or locked restraint;
   D. time-out procedures for seclusion; and
   E. temporary delay or withdrawal of regularly scheduled meals or water not to exceed 30 minutes except as provided in subpart 2a.

7. Manual restraint is defined in Minn. R. 3525.0200, subp. 8e as:

> ... physical intervention intended to hold a pupil immobile or limit a pupil's movement by using

body contact as the only source of physical restraint.

8. Mechanical restraint is defined in Minn. R. 3525.0200, subp. 8f as:

> ... the use of devices, for example, mittens, straps, or restraint chairs, to limit a pupil's movement or hold a pupil immobile as an intervention precipitated by the pupil's behavior. Mechanical restraint applies to uses intended to prevent injury with pupils who engage in behaviors, for example, head-banging, gouging, or other self-injurious actions, that result in tissue damage and medical problems. Mechanical restraint does not apply to restraint used to treat a pupil's medical needs or to position a pupil with physical disabilities.

9. The use of handcuffs constitutes a form of mechanical restraint.

10. Time-out for seclusion "involves procedures which place the pupil in a specially designated isolation room or similar space." Minn. R. 3525.0200, subp. 25b.

11. The District used the breakout room for time-out for seclusion. Each time the Student was isolated in a specially designated room, the District was obligated to follow the procedures outlined in Minn. R. 3525.2900, subp. 5D unless an emergency existed.

12. Minn. R. 3525.2900, subp. 5D provides:

> Time-out procedures that seclude a student in a specially designated isolation room or similar space must meet the following conditions:
>
> 1. specific criteria for returning the pupil to the routine activities and regular education environment;
> 2. an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;
> 3. provision for the pupil to be continuously monitored by trained staff;
> 4. adequate access to drinking water and to a bathroom for a time-out that exceeds 15 minutes;
> 5. documentation of the length of time spent in each time-out procedure and the number of occurrences each school day;
> 6. a safe environment for the pupil where all fixtures are tamper proof, walls and floors are

properly covered, and control switches are located immediately outside the room;

7. an observation window or other device to permit continuous monitoring of the pupil;

8. a space that is at least five feet by six feet or substantially equivalent to these dimensions and be large enough to allow the pupil to stand, to stretch the pupil's arms, and to lie down;

9. be well-lighted, well-ventilated, adequately heated, and clean; and

10. all applicable fire and safety codes."

13. Minnesota Rule 3525.2900, subp. 5A provides that conditional procedures may only be used when:

> ...included as part of the pupil's IEP or in an emergency situation according to part 3525.0200. In order to utilize a conditional procedure, the IEP team must:
>
> ii. identify the frequency and severity of target behaviors for which the conditional procedure is being considered;
>
> iii. identify at least two positive interventions implemented and the effectiveness of each; and
>
> iv. design and implement regulated interventions based on present levels of

performance, needs, goals and objectives, and document in the IEP.

14. Minnesota Rule 3525.0200, subp. 2c defines emergency as:

> ... a situation in which immediate intervention is necessary to protect a pupil or other individual from physical injury, emotional abuse due to verbal and nonverbal threats and gestures, or to prevent severe property damage. The emergency intervention must be the least intrusive intervention possible to reasonably react to the emergency situation. This subpart does not prohibit staff persons from using reasonable force to protect themselves or other pupils or students as provided in Minnesota Statutes, section 609.379.

15. Emergency interventions are governed by Minn. R. 3525.2900, subp. 5C which provides:

> If an emergency intervention is used twice in a month or a pupil's pattern of behavior is emerging that interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional evaluation is needed,

and, if necessary, to amend the IEP. Districts may use conditional procedures in emergencies until the IEP team meets, provided the emergency measures are deemed necessary by the district to protect the individual pupil or others from harm. The IEP team shall meet as soon as possible, but no later than five school days after emergency procedures have commenced. District administration and parents must be notified immediately when a regulated procedure is used in an emergency situation.

16. Minnesota Rule 3525.2900, subp. 5B provides:

> All behavioral interventions not covered in the IEP must be consistent with the district's discipline policy. Continued and repeated use of any element of a district's discipline policy must be reviewed in the development of the individual pupil's IEP.

See also, Inquiry of Fields, 211 Educ. Handicapped L. Rep. 437 (Office of Special Educ. Programs, U.S. Dep't of Educ., 1987) (as an Individuals with Disability Education Act matter, the Office of Special Education Programs "would encourage States and localities to be alert to the possibility that repeated discipline programs

may indicate that the services being provided to a particular child with a handicap should be reviewed or changed").

17. Denying a pupil access to toilet facilities is a prohibited procedure which may not be used by school district employees, contracted personnel, or volunteers. Minn. R. 3525.2900, subp. 5A(2).

18. Minnesota Rule 3525.2710, subp. 4F, effective November 26, 2001, provides:

> Prior to using any conditional procedure, the IEP team must conduct a functional behavioral assessment (FBA) as defined in part 3525.0200, subpart 3a. The team must also document that it has ruled out any other treatable cause for the behavior, for example, a medical or health condition, for the interfering behavior.

19. Minnesota Rule 3525.2710, subp. 4B requires the District to "obtain informed parental consent . . . prior to conducting any reevaluation" of the Student.

20. Evaluations for special education purposes, which include FBAs, must be conducted within 30 school days

from the date the District receives parental permission to conduct the evaluation. Minn. R. 3525.2550.

21. The District completed an FBA but the due date of September 20, 2001. However, there is no evidence that the Student's IEP team identified the frequency and severity of target behaviors for which the use of manual restraint, mechanical restraint, or the use of time-out for seclusion was being considered; identified at least two positive interventions implemented and examined the effectiveness of each; or designed and implemented regulated interventions based on present levels of performance, needs, goals, and objectives documented in the Student's IEP.

22. The District failed to follow consistent criteria for returning the pupil from the breakout room to his routine activities and regular education environment.

23. The records reflect a significant distinction between the Student's behavior and the District's response to the Student's behavior and programming for the Student from the 2000-01 school year to the 2001-02 school year. For example, during the 2000-01 school year the District did not handcuff the Student in response to his behavior and had more contacts with the Complainant. Additionally, the District planned for and began the

2001-02 year with numerous additional modifications for the Student including separate transportation, 1:1 paraprofessional support and a modified school schedule. However, during the 2001-02 school year, the District held only one IEP meeting at the beginning of the year while the Student attended DRS yet the noncompliance became substantive and the District did not respond as needed when Student's behavior problems started increasing.

24. There is no evidence that the Student was evaluated to determine whether seclusion was contraindicated for psychological or physical health reasons prior to the use of time-out for seclusion. Furthermore, the subsequent outside FBA report mitigates both the use of seclusion and restraint as these interventions in the school setting were known to escalate the Student's aggression. While District staff and police are allowed to use force to protect themselves, the error here is the frequency with which restraints and seclusion were used without due consideration of alternatives. In addition, isolated seclusion for hours at a time is grievous. DRS staff knew that the Student banged his head and feet following seclusion in the breakout room.

25. The District did not properly document the length of time the Student was placed in time-out for seclusion during the 2000-01 school year.

26. The removal of the door handles when the Student was in the breakout room during the 2001-02 school year prevented the Student from leaving the room in a way which was in violation of applicable fire and safety codes. *See* U.B.C. App. § 324.6 and U.B.C. § 1003.3.1.0 and Minn. R. 3525.2900 subp. 5(D)(4).

27. The Recording Sheet dated November 20, 2001, implies the Student had to wait 65 minutes to use the bathroom while he was in the breakout room. However, the facts do not indicate that the Student actually had to use the bathroom during that time. If in fact the Student had to use the bathroom and was forced to wait 65 minutes, the Student would have been denied adequate access to bathroom facilities. There is insufficient evidence showing the Student was denied access to bathroom facilities.

28. The District's labeling of the relationship between the District and the police liaison officer is not determinative. *See* Johnson v. Independent Sch. Dist. No. 535, 291 N.W.2d 699, 702 (Minn. 1980).

29. The District is ultimately responsible for the actions of its staff with regard to the implementation of the Student's IEP. If the District permits, enables, and/or assists a police liaison officer, even if separately employed by a law enforcement agency, to take action on educational interventions addressed, or which should be addressed, in the Student's IEP, the District does so at its own peril and may be held accountable for the result. *See* CFL Complaint File #1117 and CFL Complaint File #1489.

30. The District is not accountable for the police liaison officer's actions when acting in his law enforcement capacity. *See* CFL Complaint File #1618.

31. Here, DRS staff actually assisted the police liaison officer in his handling of the Student, including, but not limited to, the use of handcuffs. As such, the District was obligated to either appropriately incorporate such procedures into the Student's IEP or limit such use to emergency situations.

32. By failing to appropriately incorporate the use of manual restraint, mechanical restraint, and the use of time-out for seclusion into the Student's IEP, the District was authorized to use such only in emergency situations.

33. The weight of the evidence shows there were times the District used conditional procedures in non-emergency situations. Examples are found on the Recording Sheets dated October 29, 2001, where the Student started by "complaining about rules" and November 6, 2001, where Student wanted to use a calculator. The full text of these Recording Sheets may be found in the Appendix to this complaint decision.

34. Requesting help from a police liaison officer is not in and of itself improper. School district employees may report a crime committed by students with disabilities to law enforcement officials. *See* 34 C.F.R. § 300.529. Such reporting is also consistent with the District's discipline policy.

35. However, contacting the police liaison officer in situations where the staff does not suspect a crime or reports a crime or in non-emergency situations can have the effect of circumventing the policy of using positive approaches to behavioral interventions outlined in Minn. R. 3525.0850, 34 C.F.R. § 300.346(a)(2), and, in this case, is contrary to the Student's BIP.

36. In this case, the weight of the evidence shows the District's handling of the Student's behavior, i.e., calling in the police liaison officer and/or directing the Student

to the breakout room, escalated the Student's behavior. This escalation was predicted by the Student's outside FBA. This conclusion is further supported by the Recording Sheets dated November 12, 2001, and November 20, 2001. The full text of these Recording Sheets are found in the Appendix of this complaint decision.

37. The District held only one IEP meeting during the 2001-02 school year, at the very beginning of the school year, despite the repeated use of conditional procedures and the ongoing involvement of the police liaison officer. Conditional procedures were used at least 18 times (time-out for seclusion) and the police liaison officer intervened at least 15 times with the Student using manual restraint and handcuffs at least eight times.

38. The District failed to convene an IEP team meeting in order to determine if the Student's IEP was adequate and if additional evaluation was needed, or if a change in placement was warranted to better handle the Student's potential aggression. At least three separate provisions of the law required the District to convene the Student's IEP in this case: 1) an emergency procedure was used twice in a month or the Student's pattern of behavior was emerging that interfered with

the achievement of the Student's educational goals and objectives; 2) the continued and repeated use of the District's discipline policy pertaining to law enforcement; and 3) the Student's IEP, specifically, paragraph 13 of the Student's BIP which states, "If the above steps were unsuccessful, he may be removed from school and a meeting of appropriate individuals will set a meeting [sic] as quickly as possible to discuss alternative methods or settings to assure that the needs of [Student] and the district are protected." In prior years, it appears the District followed these prompts for team meetings, but it grossly failed to do so in 2001-02 under extraordinary circumstances. It is understood that sometimes aggressive behavior by a student requires restraints for the safety of that student, other students, or staff. The District's failure here contributed significantly to the frequency and severity of behavior management problems by the persistent use of interventions that were ineffective and even exacerbating.

39. Even in emergency situations, the District must use the least intrusive intervention possible to reasonably react to the emergency situation. Here, it is evident that the District did not always use lesser intrusive interventions. For example, the Student was kept in time-out for

seclusion for over 4.5 hours for the initial behavior of throwing pencils/pens.

40. On at least 15 times, the District failed to notify the Student's parents conditional procedures had been used in apparent emergency situations.

41. The weight of the evidence shows the District did not develop an appropriate BIP for the Student and instead relied upon the police liaison officer as part of the District's response to the Student's behavior. The evidence which supports this conclusion includes:

    A. the District failed to develop the BIP in accordance with Minn. R. 3525.2900, subp. 5D;
    B. the District failed to complete the FBA within 30 school days and to develop and/or amend the evaluation plan when further testing was necessary;
    C. the District contacted the police liaison officer for assistance on at least three occasions; and
    D. the sheer number of times the Student was manually restrained, mechanically restrained, placed in time-out for seclusion, along with the police liaison officer's consistent involvement with the Student.

42. Further, evidence that the District relied upon the police liaison officer as part of its response to the Student's behavior is the District's failure to implement the Student's BIP as written. Specifically, evidence shows that paragraph 11 of the Student's BIP pertaining to the five minute time-out was "not done very often" nor interpreted consistently. Additionally, paragraph 13 of the Student's BIP which requires a meeting as quickly as possible if the Student was removed from school did not occur.

43. It is reasonable to conclude that the Student suffered educational harm from the inappropriate educational programming provided to him at DRS and the amount of instructional time lost from seclusion and other removals. Specifically, the District failed to adequately address the Student's behavioral problems during his tenure at DRS. This resulted in the Student receiving a shortened school week and days and eventually prompted the withdrawal of the Student from school altogether. These deficiencies are clear especially during the 2001-02 school year.

Decision

The District violated Minn. R. 3525.2900, subp. 5A(1) when it failed to appropriately incorporate conditional procedures into the Student's IEP and

thereafter, used conditional procedures in non-emergency situations.

The District violated Minn. R. 3525.2900, subp. 5B when it repeatedly used an element of the District's discipline policy without reviewing it in the development of Student's IEP during the 2001-02 school year, IEP #3.

The District violated Minn. R. 3525.2900, subp. 5C when it failed to convene an IEP team meeting after using an emergency intervention twice in a month or the Student's pattern of behavior was emerging that interfered with the achievement of the Student's educational goals and objectives during the 2001-02 school year.

The District violated Minn. R. 3525.2900, subp. 5C when it failed to notify the Complainant immediately when regulated procedures were used in emergency situations throughout the 2001-02 school year.

The District violated Minn. R. 3525.0200, subp. 2c when it engaged in a pattern of use of such highly intrusive procedures such as handcuffs, time-out for seclusion, and the police liaison officer with no

evidence that less intrusive options were tried but were not successful.

The District violated 34 C.F.R. § 300.550(a) when it failed to implement the Student's BIP incorporated into IEP #3 as written.

Corrective Action

1. The District must immediately cease any practice of removing the inside door handles of the breakout room. Within 24 hours of this decision, the District must provide CFL with written verification to [Due Process Specialist], Due Process Specialist, that such practice has ceased and that all DRS staff have been informed of such.

2. The District asserts it has taken the following corrective action:
   A. The School staff are mandated to document every telephone conversation had with a student's parent;
   B. The School has developed new forms for the use of conditional procedures. 1) "Conditional Procedures Report Form," and 2) "Conditional Procedure IEP Team Meeting."

C. On October 11, 2002, the District is conducting a training on the use of conditional procedures at DRS.

3. The District's proposed corrective action is accepted in part. The District must amend its form entitled "Conditional Procedures Report Form" to include aversive and deprivation procedures which are not prohibited. This amended form must be submitted to [Due Process Specialist] for approval within 14 days of this decision.

4. Within 14 days of this decision, the District must submit a proposed agenda for the October 11, 2002 training. The information must include the names of the people who will receive the training, and the person(s) who will conduct the training, and the topics to be covered.

5. By October 18, 2002, the District must provide CFL with a list of the staff who attended the training.

6. The District must ensure an immediate independent educational reevaluation (IEE), done in a comprehensive and integrative manner, is conducted at District expense. Within five days of the date of

this decision, the District must convene the Student's IEP team for the purpose of proposing a qualified independent examiner. The District's action is contingent on receipt of consent for the evaluation. The District must provide documentation that it has complied with this directive within seven days of this decision to [Due Process Specialist], who is assigned to oversee corrective action.

7. Within five days of the completion of the IEE, the District must convene the Student's IEP team to review and revise the Student's IEP to reflect the findings of the IEE. The District must send the ER, the proposed IEP, and the corresponding Notice of Proposed Special Education Services, including the Student's response, to [Due Process Specialist] no later than November 30, 2002, unless a time extension is granted for good cause.

   In addition, the Student's IEP team must develop a compensatory educational plan for the Student. This plan must address the impact the inadequate educational planning and over reliance on the use of police for intervention used at DRS had on the Student. The plan must be agreeable to the Student, educationally meaningful, address all areas of

disability, and be convenient for the Student to access. The District must notify [Due Process Specialist] in writing of the plan for compensatory services. If the District and the parents are unable to reach an agreement on a plan for compensatory services, the District must notify the CFL within five days of the team meeting regarding the reasons for the impasse at which time CFL will make the determination on a plan for compensatory education services.

8. This decision will be forwarded to [MOMA Supervisor], Supervisor for CFL's Maltreatment of Minors Program to determine whether there is sufficient evidence of physical or mental injury to warrant further investigation under Minn. Stat. § 626.556.

The authority to review complaints is given in the federal regulations to the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. §§ 300.660-.662. Questions about this decision should be directed to the complaint investigator, [Investigator]. If the Complainant has subsequent concerns about the District's implementation of the corrective action, he/she should contact due process specialist, [Due Process Specialist].

Sincerely,

Thomas J. Lombard, Ph.D.
Manager
Division of Accountability and Compliance

APPENDIX

Recording Sheet dated October 29, 2001, provides:

> [Student] started in when [M.S.] was complaining about rules, he joined in and it escalated to the point when we needed him in breakout. He didn't go in we need [sic] [police liaison officer] to help corrall [sic] him, he still didn't go in so we got [lead teacher]. [Student] sat in a desk in the hall way. [Lead teacher] pulled the desk in, and he sat in there. He laid down for a while [sic] then went next store to [teacher's] room. We said if he could calm down for 10 minutes he could still go to phy. Ed. He agreed and went in to lay down.

Student spent 50 minutes in the breakout room.

Recording Sheet dated November 6, 2001, provides:

> [Student] wanted to do math. He demanded a calculator, I suggested he try it with out [sic] first. Emmediately [sic] he got up & got one [sic] I told him he was off task. Then he tried to get the point sheet away from me. He walked around in the hall for a while [sic] & tried to elbow me as well as kick me a couple of times. He also got a little physical w/[teacher]. He walked down to [lead teacher's] room (w/out permission) and went in her office. He called his mom w/[lead teacher] & did his time out next in the breakout room next to [lead teacher's] office. [Student] completed his time out at 11:40. 11:25 currently laying down in breakout room.

Student spent 55 minutes in breakout room.

Recording Sheet dated November 12, 2001, provides:

> [Student] greed that we would do spelling after activity room. He stopped half way through spelling being inappropriate grabbing my belt, throwing goldfish spitting 'em out on me & [teacher]. It then was time for breakout room. Totally uncooperative wouldn't stay in breakout room, he went to [police

liaison officer's] office (thank God) [police liaison officer] escorted him to break out room banging on doors, windows, walls grabbed a broom & threatened [police liaison officer] & I with it. [Police liaison officer] diffused the situation [Student] continually tried to punch me about 3-4 times. [Lead teacher] directed me to leave to give [Student] & myself a break from each other.

12:20 [Student] is laying on the floor sleeping.
12:30 [Student] woke up & is eating lunch. He came out of the breakout room when he was told to stay in there.

12:45 [Student] opened the door & layed [sic] in front of it so that it couldn't be closed. He said he wanted a pillow so we told him he could have one if he went back in the room. He complied & [lead teacher] got him a pillow from the nurse.

12:55 [Student] is sleeping again.
2:00 [Student] woke up & is just sitting on the floor
2:02 [Student] laying down again
2:05 Sleeping again
2:15 Out of room

Student spent 2.5 hours in the breakout room.

Recording Sheet dated November 20, 2001, provides:

> [Student] was throwing things (pencils & pens) at me – Asked to go to breakout room – refused- rest of class heading to library – [Student] walked out – toward breakout room by [teacher's room] – instead walked down hall – [student's assistant], [lead teacher] [another assistant] got him in room – [EBD coordinator] showed up – [Student] became more physical & aggressive kicked [Student's assistant], punched [lead teacher]. [EBD coordinator] got [Student] to do time out. [Student] called mom and [police liaison officer] & [Student's assistant]
>
> agreed he should go back to class. We let him back in and he was immediately disruptive. We got him back in the breakout room w/[lead teacher], [police liaison officer], [Student's assistant], [EBD coordinator], [another assistant]. [Student] struck [assistant] in the chest – shoulder he took off all the door handles, repeatedly went in to disrupt [teacher's] room. Ripped the blanket and tried to break the door closure w/a piece of blanket.

Banging on glass of doors w/handles the door closure. At that time we went in to take the blanket away & pillow.

12:10 Taking sock trying to put around door closure
12:10 Banging on door
12:20 Picking nose & wiping boogers on glass
12:25 Kicking door
12:30 Banging on the door handle
12:35 [Student] was given wipes to clean the buggers [sic] off the door. He left the breakout room & it took the [police liaison officer] to get him back in. [Student] was given his lunch & was told he would be taken to the bathroom when he could sit & be appropriate.

12:36 [Student] was yelling & kicking the door.
12:40 He sat down & ate his lunch.
12:45 [EBD coordinator] came & took [Student] to take a phone call from his dad.

12:50 [Student] escorted back to the breakout room by [police liaison officer]. He is continuing to eat his lunch.

1:00 [Student] layed [sic] down & fell asleep.

1:35 [Student] is standing at door & walking around the room.

1:40 We took [Student] to the Bathroom & then returned him to the breakout room. He asked to color so I got him paper & crayons as per [lead teacher].
3:00 [Student] is laying on the floor. Crayons on desk.

3:25 Still laying on the floor NOT sleeping.
3:30 Standing by classroom door
3:35 [Student] was taken to the bathroom & then to his bus.

Student spent 4 hours and 35 minutes in the breakout room.

Complaint File #1408
April 1, 2002
Saint Paul ISD #625

Dear Superintendent and Complainant(s):

This letter is to inform you of the findings of the complaint entered by [Complainant] on behalf of [Student], a resident of Independent School District #625 (District). What follows is the report of the investigation, the issues, findings of fact, conclusions of law or rule, and order, where applicable. [Investigator] coordinated the investigation.

ISSUE #1

The Complainant alleges the District violated standards pertaining to the use of conditional and prohibited procedures. Specifically, the Complainant alleges staff at the Eisenmenger Program at the Museum Magnet/Rondo School used conditional procedures, such as excessive time-out procedures and physical restraints, from January 10, 2000, to February 2001, with the Student, despite not being authorized. Further, the Complainant asserts school employees have repeatedly used prohibited procedures as

behavioral interventions with the Student during the same time period.

Findings of Fact

1. The Student is age 13 and is a resident of the District. He is currently in grade seven, attending Murray Middle School.

2. The District determined the Student's primary disability to be other health impaired (OHI).

3. The Student has been educated primarily in the District since 1992, except for periods of time when he was enrolled in Tri-District, the FACS Program, and was home-schooled.

4. The Complainant enrolled the Student in the Rondo-Eisenmenger Program (Rondo-Eisenmenger), located at the Museum Magnet/Rondo Elementary School on January 10, 2000, "because District personnel told her there was no other placement available for him." At that time, the Student was 11 years old and in grade five.

5. Rondo-Eisenmenger is one of seven Federal Setting III, self-contained special education programs for students with emotional behavioral disorders (EBD) in the District. In its response, the District stated Eisenmenger Learning Services is a collaborative program between the "Saint Paul Public Schools and the Wilder Foundation, providing academic and behavioral programming for students in grades K-6 with serious social, emotional, learning and behavioral disorders...."

6. The complaint investigator visited the intervention area used for time-out purposes at Rondo-Eisenmenger. The intervention area consists of three separate sections:

   A. A carpeted study area containing a student desk and windows to the outside;
   B. A carpeted area containing three open-front stalls, each approximately 30 inches wide by 27 inches deep. The stalls contain no furniture. The side walls are floor-to-ceiling concrete blocks, and the back of each stall is wooden; and
   C. A locked seclusion room, known as the Blue Room.

7. Access to the Blue Room is through a steel door on one side of the intervention area. The steel door has a vertical window, 6 inches wide by 27.5 inches high. The door into the intervention area can be locked with a key from the outside. The Blue Room is roughly L-shaped, and is 92 inches deep by 75 inches wide, except for a small area where a concrete floor-to-ceiling wall extends partway into the room. The walls are concrete blocks without windows. The floor is linoleum. There are fluorescent lights, a smoke detector, and a sprinkler system on the ceiling. There is no light switch inside the Blue Room. The Blue Room did not contain any furniture.

8. The District's documentation of the times the Student was placed in time-out in the intervention area is detailed in Appendixes A, B, and C of this report.

9. The time-out documentation does not always note whether the Student was in the Blue Room, the study portion, or the stall section of the intervention area. The Student's team leader said the Student was not allowed to take any schoolwork into either the Blue Room or the stall portion of the intervention area.

10. The District acknowledges that the Student did not have a Behavior Intervention Plan (BIP) from January 2000 through February 2001.

11. The District acknowledged "it violated standards pertaining to the use of conditional procedures with this student." The District acknowledges the "intermittent use of…manual restraint and seclusionary time-out." In addition, the District acknowledges "violation of notification to parent of the Emergency Use of a Conditional Procedure at the time of occurrence."

12. The Complainant asserts the staff at Rondo-Eisenmenger used prohibited procedures with the Student. The Complainant wrote:

> 2-7-2001 – [Student] came home with severe bruise marks on both wrists from being restrained at school, staff placing him into isolation room where [Student] was banging his head stating he wanted to kill himself.

13. The Complainant provided a "Note Home," prepared by the Student and his teacher dated February 7, 2001. This note stated that the Student spent no time

in intervention, and that he "had a great day." In the Student's printing, it is noted that he did everything well that day.

14. However, in its response to this complaint, the District provided documentation showing the Student was placed in the intervention area from 11:38 until 12:00 on February 7, 2001:

> [Student] became angry when some girls stepped on his coat on the playground. He swore at them....As he was coming in the building he threw snow at them. He then swore at staff, classmates and he threatened another student....

There is no indication as to whether manual restraints or seclusion were used with the Student.

15. In its response, the District provided documentation of another incident on February 7, 2001, as follows: "[Student] was given a stop and think he refused his stop and think in the room. [Student] was escorted to IV [intervention]. He refused to go to IV so he was escorted." The document contains no information to indicate the Student was restrained or placed in seclusion. It is noted on the document that the

physical safety measure taken was "Transport" to the intervention area.

16. The Complainant provided a copy of a letter she wrote dated February 8, 2001, addressed to the Student's team leader. It states in relevant part:

> I am writing to inform you that [Student] received severe bruise marks on both of his wrists on 2-7-2001 from staff members while being restrained and carried to the intervention room. I had requested that staff not restrain [Student], unless it was a physical danger to himself or others, and it sounds like this was because he refused to walk to intervention after a fight on the playground during recess. I did get a call from his teacher…and she did state he had to be restrained by her and another staff member on that date and that he was placed into the isolation room, where [Student] was banging his head on the concrete wall stating he wanted to kill himself…Can you please send home with [Student] this evening all information regarding the playground incident as well as who restrained him, and how long he was placed in isolation and who if anybody talked to him

while in isolation about what he was stating at the time. ..If you want to talk with [Student] along with staff members that you do so by setting up a meeting at which I can attend with [Student]....

17. The Complainant provided a hand-written document dated February 13, 2001, that she allegedly received from the Student's classroom teacher at a meeting held at Rondo-Eisenmenger on February 13, 2001. According to the Complainant, the document is the further explanation she requested concerning the events of February 7, 2001, as follows:

> When [Student] came into the hallway by our classroom he looked angry. I asked him what was wrong. He said [swearing]. I told him I wanted to be able to help him. He repeated [swearing]. I told him he needed to go to intervention until he was calm enough to talk about what was going on. Then Ms. M. came in and said [Student] needed to go to intervention. [Student] ran through the double doors [into the other part of the school]. Because he was not acting playful, like he sometimes does when he runs, I asked Mr. W. to help me. [Student] was

running through the hall very quickly. A line of kindergartners was trying to walk. Mr. W. stopped [Student] by putting him in a basket hold. [Student] was struggling. As we were walking back to our program, Mr. W. turned backwards because [Student] was kicking the doors. Then [Student] was trying to wrap his legs behind Mr. W. to trip him. I picked up [Student's] legs. [Student] twisted out of Mr. W.'s arms and Mr. W. caught him by the wrists to keep him from hitting his head. Because we were close to the intervention room we brought him the rest of the way and put him in the isolation room. As soon as the door was shut [Student] hit his head 3 times and said, "I want to kill myself." I left the room to call the therapist and [Student's] mom. Mr. W. told me that after I left the room [Student] calmed down and talked with Mr. F. At 12:15 I returned and talked with [Student] about how things were going with him in general.

18. The Complainant alleges the Student received additional injuries at school on February 15, 2001, including bruises on his forehead and scratches on his back. She states the Student told her he was restrained

by two staff who "threw" him into the Blue Room. She states he told her the bruises on his forehead were caused when he repeatedly banged his head on the steel door.

19. The District's documentation shows the Student was transported, restrained, and placed in seclusion from 11:45 until 3:30 on February 15, 2001. The record describes what occurred when the Student was placed in the intervention area:

> [Student] wanted to go to intervention. I said he could take a chill of 4 min. or less. He said, "It's not going to be a chill. I am staying." I told him to stop before he left the room. He would not. On his way down the hall I told him to stop or he would need to eat lunch upstairs. He continued to walk to IV. This is the 2nd time he has been wandering the halls today.

The following notation is in a different handwriting on the back of the document:

> **[Student] was transported to the blue room (2 staff carry) once in the blue room**

[Student] banged his head on the cement wall and the door for over 10 minutes.

(Emphasis added.)

There is a separate typed sheet stapled to the back of the document. It is noted:

> After coming back to class after taking a "chill" in Intervention (less than 4 minutes), [Student] was asked to take a "stop and think" for swearing about doing his reading. He refused to take a stop and think and Mr. P. asked [Student] to go to Intervention – and gave him 2 minutes to get there on his own. [Student] ran under the table in Ms. A's room. Mr. W. and Mr. P. stood at the end of the table so [Student] could get out one way. [Student] ran to the door and Mr. P. took [Student] by one arm to escort him to Intervention, since [Student] has a history of running out of the area. In the hallway, [Student] threw a book at Mr. P. and hit Mr. P. He then threw a punch at Mr. P. and missed…that's when Mr. P. and Mr. J. transported [Student] to the Intervention room. Once we got to Intervention, [Student] was put in the blue room. He spit on Mr. P.…He then

tapped his head against the wall in the blue room (not hard at all). Staff did not hold [Student] at this time because of a prior conversation with mom and an agreement that staff would hold [Student] if the head banging was hard.

20. The Complainant provided photographs of the injuries the Student allegedly received on February 15, 2001, from Rondo-Eisenmenger staff. One picture shows a large scratch and a smaller scratch on the Student's back, which he alleged occurred when he was "thrown" into the Blue Room and hit into the wall that juts out into the Blue Room. Later when the complaint investigator asked the Student about the incident, he stated he hit his leg when he was thrown into the room. He also stated the scratches were from a staff's fingernails.

21. According to the Complainant, the Student refused to attend Rondo-Eisenmenger after February 15, 2001, stating he was afraid. She stated his treatment there increased his anxiety. The District concurs that February 15, 2001, was the Student's final day at Rondo-Eisenmenger.

22. The staff he named deny using improper hold techniques, deny throwing the Student into the Blue Room, and deny intentionally injuring him in any way.

23. The Student told the complaint investigator that some District staff often hurt him while physically restraining him. He also stated certain staff were kind and did not hurt him. He alleged being restrained in the following ways:

    A. Being placed face down on the floor with his arms crossed in front and underneath him, while staff held him there by placing a knee in his back, and pulling upward on his hands;
    B. Being restrained with his arms crossed in front with the staff person putting their fingernails into his shoulder blades leaving fingernail marks;
    C. Having his arms crossed and pulling his arms back so far that it hurt, and he fights back by using his legs; and
    D. Having his arms crossed so tightly that it is hard for him to breathe.

24. Rondo-Eisenmenger staff deny the Student's allegations.

25. The Student stated there were times when he was not allowed to use the bathroom or have a drink while in seclusion even if he was quiet.

26. In its response, the District:

> denies this allegation. A staff interview indicates that Student was never denied access to water or the toilet facilities. In fact, staff routinely offer students water while in intervention. Staff report that when given water it appears to aid in comforting and calming students who are having behavior problems. Staff routinely provide bathroom privileges and breaks to students while in intervention area.

27. In an interview, the complaint investigator asked the team leader whether the Student is allowed to go to the bathroom or get a drink while in seclusion. She said if he asks for water, they give it. If he asks to use the bathroom, he is told, "As soon as you are calm and safe, then we'll take you to the bathroom."

28. Other Rondo-Eisenmenger staff who work with the Student indicate he was never denied access to water or the toilet facilities.

29. The Student also told the complaint investigator that items were removed from lunches of students in the intervention room. The Student said that the staff members waved food in front of his face and told him he did not deserve the food.

30. During a site-visit, the team leader told the complaint investigator that one of the staff did remove cookies from the lunches of some students who were in the intervention room, but has been directed to stop this practice.

31. The District indicated it has taken the following corrective action:

    - notified all the lead teachers and support staff at all Eisenmenger locations about violations in the use of conditional procedures;
    - trained all Rondo-Eisenmenger staff in the due process procedures required when a conditional procedure is used;

- provided all Eisenmenger lead teachers with a help sheet to provide assistance in implementing conditional procedures and development of BIPs; and
- held informational meetings with parents at each Eisenmenger site on the BEST (Behaviorally Effective Skills Training) management system as it is currently implemented.

Conclusions

1. The District must provide special education and related services to a student with a disability in accordance with the Student's IEP. *See* 34 C.F.R. § 300.350.

2. According to Minnesota Rules, "there are two types of regulated interventions: conditional procedures and prohibited procedures." Minn. R. 3525.2900, subp. 5 A.

3. Conditional procedures may only be used when included as part of a student's IEP or in an emergency situation. In order to utilize a conditional procedure, the IEP team must:

(a) identify the frequency and severity of target behaviors for which the conditional procedure is being considered;

(b) identify at least two positive interventions implemented and the effectiveness of each; and

(c) design and implement regulated interventions based on present levels of performance, needs, goals and objectives, and document in the IEP.

Minn. R. 3525.2900, subp. 5 A (1).

4. Minnesota Rule at 3525.0200, subp. 1g defines conditional procedures as follows:

"Conditional procedures" means interventions that meet the definitions of aversive and deprivation procedures which are not prohibited. Conditional procedures include:

A. the use of manual restraint;

B. the use of mechanical or locked restraints;

C. time out procedures for seclusion; and

D. temporary delay or withdrawal of regularly scheduled meals or water not to exceed 30 minutes except as provided in subpart 2a.

5. Manual restraint is defined at Minn. R. 3525.0200, subp. 8e as:

> ...physical intervention intended to hold a person immobile or limit a person's movement by using body contact as the only source of physical restraint.

6. "Time out for seclusion" involves procedures which place the pupil in a specially designated isolation room or similar place. Minn. R. 3525.0200, subp. 25b.

7. Between January 12, 2000, and February 15, 2001, the District used conditional procedures with the Student, including manual restraint and time-out procedures for seclusion, without including them on the Student's IEP, in violation of Minn. R. 3525.2900, subp. 5 A(1).

8. An emergency is defined as:

> a situation in which immediate intervention is necessary to protect a pupil or other individual from physical injury, emotional abuse due to verbal and nonverbal threats and gestures, or to prevent severe property damage. The

emergency intervention must be the least intrusive intervention possible to reasonably react to the emergency situation…

Minn. R. 3525.0200, subp. 2c.

9. According to Minnesota Rules:

> If an emergency intervention is used twice in a month or a pupil's pattern of behavior is emerging that interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional assessment is needed, and, if necessary, to amend the IEP. Districts may use conditional procedures in emergencies until the IEP team meets, provided the emergency measures are deemed necessary by the district to protect the pupil or others from harm. The IEP team shall meet as soon as possible, but no later than five school days after the emergency procedures have commenced. District administration and parents must be notified immediately when a regulated procedure is used in an emergency situation.

Minn. R. 3525.2900, subp. 5 C.

10. Between January 12, 2000, and February 15, 2001, the District exceeded the allowable use of emergency interventions, failed to notify the Complainant, failed to convene the IEP team to determine if his IEP was adequate, and failed to conduct an evaluation as required, in violation of Minn. R. 3525.2900, subp. 5 C. Additionally, not only did the District fail to notify the Complainant immediately on February 7, 2001, of the use of emergency intervention, a note was prepared and given to the Complainant misrepresenting events of the day.

11. Prohibited procedures are actions that are prohibited from use in schools and are listed in Minn. R. 3525.2900, subp. 5 A(2) as follows:

    (a) corporal punishment as defined in Minnesota Statutes, section 121A.58;
    (b) requiring a pupil to assume and maintain a specified physical position, activity, or posture that induces physical pain as an aversive procedure;
    (c) presentation of intense sounds, lights, or other sensory stimuli as an aversive stimulus;
    (d) use of noxious smell, taste, substance, or spray as an aversive stimulus;

(e) denying or restricting a pupil's access to equipment and devices such as hearing aids and communication boards that facilitate the person's functioning except temporarily when the pupil is perceived to be destroying or damaging equipment or devices;
(f) faradic skin shock;
(g) totally or partially restricting a pupil's auditory or visual sense not to include study carrels when used as an academic intervention;
(h) withholding regularly scheduled meals or water; and
(i) denying a pupil access to toilet facilities.

32. The evidence shows the Student sustained bruises and scratches, and that something occurred that "frightened him." While the District documented different versions of events, the evidence is inconclusive as to whether these injuries were the result of the use of prohibited procedures or whether they were the unintended result of maintaining control over the Student to place him in the Blue Room.

33. Documentation for the incidents when the Student was in a time-out for seclusion does not contain any

details about whether the Student asked for water or for permission to use the toilet facilities. These documents also do not contain any information as to whether water or the opportunities to use the toilet were offered to the Student without his asking for them. It is evident that Rondo-Eisenmenger staff are aware of the requirements to provide water and toilet breaks, and there is insufficient evidence to conclude the Student was denied these provisions.

34. The District acknowledges that a person employed at Rondo-Eisenmenger removed cookies from one of the students' lunches. This practice was subsequently corrected by the District.

35. The District used conditional procedures with the Student for over one year while failing to comply with laws related to their use. Because of the District's documentation procedures, it is not possible to determine the amount of time he was removed from his class and deprived the opportunity to complete his schoolwork. It is reasonable to conclude that he was deprived of many hours of educational opportunity while in time-out for seclusion, resulting in an interference with the Student's ability to receive

a free appropriate public education (FAPE). He is entitled to compensatory services.

Decision

The District violated Minn. R. 3525.2900, subp. 5 A(1) when it used conditional procedures between January 12, 2000, and February 15, 2001, without including them on the Student's IEP.

The District violated Minn. R. 3525.2900, subp. 5C when it used emergency interventions between January 12, 2000, and February 15, 2001, without notifying the Complainant and without calling the IEP team together to review the adequacy of the IEP and need for further evaluation.

Corrective Action

See end of final decision.

ISSUE #2

The Complainant alleges the District violated standards regarding time-out procedures that seclude the Student in a specially designed room or similar space. Specifically, the Complainant alleges:

A. The Student's teacher at the Eisenmenger Program does not create specific criteria for returning the Student to his routine activities and regular education environment once he is placed in time-out for seclusion;

B. The District has not conducted an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;

C. School employees do not provide adequate access to drinking water and to a bathroom for a time-out for seclusion for the Student that exceeds 15 minutes;

D. School employees are not properly documenting the length of time the Student spends in each time-out procedure and the number of occurrences; and

E. The time-out for seclusion room (Blue Room) at the Eisenmenger Program is not a safe environment for the Student because the concrete block walls and the tile floor are not covered, and the Student is forced to sit on the bare floor, sometimes for hours at a time.

Findings of Fact for Issue #2A: The Complainant alleges the Student's teacher at the Eisenmenger Program does not create specific criteria for returning the Student to his routine activities and regular education environment once he is placed in time-out for seclusion

1. In its response, the District stated:

> The District has specific criteria for a student returning to the classroom from out-of-classroom intervention that the Rondo Eisenmenger staff followed with Student. The District has developed and adopted the use of the Behaviorally Effective Skills Training (BEST) Program. (See enclosed copy of the BEST Program Manual.) The criteria are outlined in the BEST Program Manual. The criteria states: "The student, depending upon exhibited behaviors, will then be assigned a space to focus on relaxing and regaining self-control through demonstrating a calm body with the related observable behavior for a short designated period of time (no more than two minutes)." (p. 51) Once the student demonstrates a "calm body", the staff talk to the student and review the school success skill (e.g.,

handling anger, following directions, etc.) that resulted in the student needing to go to out-of-class intervention. Depending upon the behavior, a student may be required to develop and, when appropriate, carry out a restitution or a "fix-it" plan (e.g., picking up items thrown, wiping an area where the student spit, etc.) before returning to the classroom. In addition, the BEST brochure details this procedure. (See section titled "Integrating School Success Skills Throughout the School Day").

2. The District used four methods to document the Student's placements into the intervention area: (1) Intervention Log (Log); (2) Out of Class Intervention Room Referral (Referral Forms); (3) Note Home; and (4) Out of Classroom Intervention by Days (Behavior Chart). See Appendixes A, B, and C.

3. Most of the documents do not refer to actions the Student must take to return to his classroom.

4. The Complainant stated the Student told her he has to stay in the intervention room and cannot go back to class if that class period has started, even when he is calmed down and ready to go back to class.

5. District staff deny this allegation.

Conclusions for Issue #2A

1. Time-out procedures for seclusion must meet specific conditions as stated at Minn. R. 3525.2900, subp. 5 D:

> D. Time-out procedures that seclude a student in a specially designated isolation room or similar space must meet the following conditions:
>
> (1) specific criteria for returning the pupil to the routine activities and regular education environment;
>
> (2) an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;
>
> (3) provision for the pupil to be continuously monitored by trained staff;
>
> (4) adequate access to drinking water and to a bathroom for a time-out that exceeds 15 minutes;

(5) documentation of the length of time spent in each time-out procedure and the number of occurrences each day;

(6) a safe environment for the pupil where all fixtures are tamper proof, walls and floors are properly covered, and control switches are located immediately outside the room;

(7) an observation window or other device to permit continuous monitoring of the pupil;

(8) a space that is at least five feet by six feet or substantially equivalent to these dimensions and be large enough to allow the pupil to stand, to stretch the pupil's arms, and to lie down;

(9) be well-lighted, well-ventilated, adequately heated, and clean; and

(10) all applicable fire and safety codes.

Minn. R. 3525.2900, subp. 5 D.

2. When District staff removed the Student from his classroom and placed him in the Blue Room or the stall portion of the intervention area, they were using a time-out procedure requiring the creation of specific criteria so the Student could return to his classroom.

3. The District states staff at Rondo-Eisenmenger received training regarding establishing criteria for

returning the Student to his regular activities after being placed in time-out for seclusion, and points to the BEST brochure and the BEST training manual as proof.

4. The information included in the BEST brochure and in the BEST training manual, however, is not proof that District staff trained in its methods are complying with them.

5. The Student states he was not given information about what he needed to do to return to the classroom and to his other routine activities. Staff interviewed at Rondo-Eisenmenger stated the Student was always told what he needed to do to return to his regular activities.

6. The evidence is inconclusive as to whether the District always established specific criteria for returning the Student to his regular activities.

Decision for Issue #2A

The District is not in violation.

Findings of Fact for Part B: The Complainant alleges the District has not conducted an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons.

1. The Complainant alleges that in addition to the fact the Student did not have a BIP, the Student should not have been placed into time-out for seclusion because he has many areas of disability that contraindicate the use of time-out for seclusion. She alleges there are numerous examples in the Student's educational records such that the District should have known not to use time-out for seclusion procedures, including manual restraints, with the Student.

2. In its response, the District stated:

> The IEP team reviewed and accepted the reevaluation completed at Tri-District School in June, 1999 that included the assessment results of a psychological evaluation by Gillette Hospital. No contraindications for the use of seclusionary time-out were indicated. There was previous use of seclusionary time-out used with Student at FCAS Program that is documented in the June 1999 ESR and a Functional Behavioral

Assess-ment (FBA) that was also conducted there. There is also a Behavior Intervention Plan (BIP) developed in 1998 at Tri-District that includes the use of Crisis Prevention Institutes (CPI) manual restraint procedures as part of the plan. (See enclosed copies of the ESR, FBA and BIP.)

Student has received services at Rondo Eisenmenger from a Wilder mental health service provider. There is no indication from this mental health service provider that seclusionary time-out was contraindicated.

In addition, at no time did the parent indicate to the IEP team that this intervention was an issue and should be given consideration in dealing with behaviors.

3. The Complainant disagrees with the District's assertions stated in #2 above. She states she objected to the use of time-out for seclusion and manual restraint procedures used with the Student at the FCAS Program, and so she removed him from that program. She stated:

I'd like to clearly state that the FCAS program never informed me of any such seclusionary room or that they use restraining as an option in their program. When it came to my attention that [Student] was being restrained and placed into seclusion I immediately called the program and asked how come I was never informed of such procedures in my intake interview. The program stated that the person filling in for the supervisor should of informed me of their procedures and apologized. I had withdrawn [Student] that day from the program, because of him being placed into seclusion. [Student] was terrified to go back to that program after being placed into seclusion, the day of the incident he came home crying and shaking as he was trying to tell me of what hap-pened that day at FCAS program. I as his mother would have never agreed to such treatment of my child. As the District is aware of with [two District staff] both of St. Paul Schools Special Ed. Dept. whom were aware of this incident with FACS and helped me get [Student] back into Tri-District School and attended meetings with [Doctor] from Gillette hospital. [Doctor] attended IEP meeting at Tri-District school Feb. 1999. And

> clearly explained that [Student] will not be successful in a program like FCAS, that his treatment at FCAS was not appropriate. [Student] would not benefit from a program like that in the future nor one with a points system, she also stated that kind of program would set [Student] up for failure. All of which is included in [Doctor's] Gillette report.

4. The FBA Report to which the District refers is dated November 10, 1998. The FBA is contained in the Student's educational records. It is noted in the FBA Report:

> [Student's] time in the FCAS Program was unsatisfactory and his behavior in the program escalated further. His parents report that he was restrained several times by the staff and placed in a time-out room for significant parts of his day. His parents removed him from this program....

5. In the Student's educational records, there is a copy of an IEP proposed by Tri-District in December 1999 (12/99 Proposed IEP) with an accompanying proposed BIP. Tri-District sent a Notice of Proposed

Special Education Services dated December 16, 1999, to the Complainant, who signed it, and stated she did not give permission for the school district to proceed as proposed. Shortly thereafter, she removed the Student from Tri-District.

6. As noted in the District's response, as part of a reevaluation of the Student, a doctor at Gillette Hospital conducted a psychological evaluation from December 1998 to February 11, 1999. The resulting report (1999 Psych Eval) dated February 18, 1999 notes:

> In the past six years [Student] has been given various medications and his [sic] been given the diagnosis of Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, anxiety, depression, and bipolar disorder.

When speaking of the Student's behavior difficulties, the report stated:

> **The discipline problem appears to come out of power struggles and when physical contact is engaged, [Student] kicks, hits, and screams and becomes very threatening and hurtful.**

> He sometimes takes, according to his mother, an hour or so at most to calm down. Other times it takes 10 minutes.

(Emphasis added.)

7. In mid-May 2001, the District arranged for an independent educational evaluation (IEE) of the Student. The resulting report (IEE Report) dated August 23, 2001, stated:

> The Student may have developed post traumatic stress-like (PTSD) symptoms, so the use of seclusion and restraints must be avoided to prevent a worsening of his symptoms.

8. The IEE was arranged after the Student was withdrawn from the Rondo-Eisenmenger program in February 2001.

Conclusions for Issue #2B

1. According to Minnesota Rules, if a District plans to use a time-out procedure that secludes a student, it must first conduct an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons. *See* Minn. R. 3525.2900,

subp. 5 D(2). The specific contraindications necessary to preclude the use of seclusionary time-out procedures are not outlined in these rules.

2. When District staff removed the Student from his classroom and placed him in the Blue Room, they were using a time-out procedure requiring a previous evaluation of the Student to determine whether seclusion was contraindicated for psychological or physical health reasons.

3. None of the documents to which the District refers as its justification for the use of time-out for seclusion procedures (1999 Psych Eval, ESR, etc.) addressed the issue of whether time-out for seclusion procedures were contraindicated for use with the Student. The 1999 Psych Eval noted, however, that as part of his behavioral difficulties, "The discipline problem appears to come out of power struggles and when physical contact is engaged, [Student] kicks, hits, screams and becomes very threatening and hurtful. He sometimes takes…an hour or so at most to calm down. Other times it takes 10 minutes." District records included a copy of the 1999 Psych Eval.

4. The District did not conduct an evaluation of the Student during the 13 months he was enrolled at Rondo-Eisenmenger to determine if time-out for seclusion procedures were contraindicated. The IEE recommended that "the use of seclusion and restraints must be avoided..." Further, the District had in its records a 1999 Psych Eval noting similar contradictions. Therefore, the District's evaluation was not timely, and it proceeded to allow the use of regulated interventions, which were contraindicated: the Blue Room was used often and on several occasions for more than an hour.

Decision for Issue #2B

The District violated Minn. R. 3525.2900, subp. 5 D(2) when it failed to conduct a timely evaluation to determine whether time-out for seclusion was contraindicated for the Student for psychological or physical health reasons, and then used regulated interventions that were contraindicated.

Discussion

The use of time-out for seclusion, manual and mechanical restraints, and other interventions are extraordinary

measures to be used as little as possible and for short durations. The frequent and prolonged use of the intervention area, including the Blue Room, with the Student should have prompted the District to conduct an evaluation early in his placement in the Rondo-Eisenmenger program.

Corrective Action for Issue #2B

See end of final decision.

Findings of Fact for Issue #2C: The Complainant alleges school employees did not provide adequate access to drinking water and to a bathroom for a time-out for seclusion for the Student that exceeded 15 minutes.

1. The issue of whether the District withheld water from the Student while he was in time-out for seclusion was addressed in the Findings of Fact for Issue #1.

Conclusions for Issue #2C

2. It is prohibited for school districts to withhold water and deny students access to toilet facilities. *See* Minn. R. 3525.2900, subp. 5 D(4).

3. The evidence is inconclusive as to whether the District denied the Student access to water and to toilet facilities while he was in time-out for seclusion.

Decision for Issue #2C

The District is not in violation.

Findings of Fact for Issue #2D: The Complainant alleges school employees did not properly document the length of time the Student spent in each time-out procedure and the number of occurrences.

1. The documentation provided by the District for the times the Student was removed from his classroom and placed in the intervention area is detailed in Appendixes A, B, and C.
2. The District used four methods to document the Student's placements into the intervention area: (1) Log; (2) Referral Forms; (3) Note Home; and (4) Behavior Chart. In reviewing these documents, there are many instances when the beginning and ending times are not listed. A Log is not available for January through June 2000. The Log for September 14, 2000, through February 15, 2001, shows

beginning or ending times are either not listed or are crossed out for the following days:

Oct. 3, 2000	November 1, 2000	January 9, 2001
Oct. 9, 2000	November 14, 2000	February 6,
Oct. 18, 2000	November 29, 2000	2001

Some of the Referral Forms for the 1999-00 school year do not show ending times on the following dates:

February 17, 2000	October 2, 2000	January 31, 2001
February 24, 2000	November 2, 2000	February 6, 2001
February 25, 2000 (2 instances)	January 18, 2001 (2 instances)	

Conclusions for Issue #2D

1. School districts must document the length of time spent in each time-out procedure and the number of occurrences each day. *See* Minn. R. 3525.2900, subp. 5 D(5).

2. When District staff removed the Student from his classroom and placed him in the Blue Room, they were using a time-out procedure requiring accurate documentation of the length of time spent in time-out and the number of occurrences each day.

3. Comparisons of the four types of documentation created by the District reveal many discrepancies as to the number of occurrences and amount of time the Student spent in time-out for seclusion. For instance, the Log states the Student was in the intervention area on February 5, 2001, from 10:00 to 10:30, from 12:30 to 3:30, and from 2:37 to 3:00. Referral Forms for February 5, 2001, state the Student was placed into the intervention area from 10:00 to 10:20, from 12:32 until 3:30, and from 2:37 to 3:00. But a Note Home for that date stated the Student was in the intervention area for a total of 52 minutes on February 5, 2001, and the Behavior Charts show the Student was in the intervention area one time on February 5, 2001.

4. Other discrepancies in District documentation: For the 1999-00 school year, Referral Forms show the Student was in the intervention area 70 times. The Behavior Chart shows the Student was in the intervention area 45 times. For the 2000-01 school

year, the Log indicates the Student was in the intervention area 59 times. The Referral Forms state the Student was in the intervention area 68 times. The Behavior Chart indicates the Student was in the intervention area 41 times.

Decision for Issue #2D

The District violated Minnesota Rule 3525.2900, subp. 5 D(5) when it failed to properly document the length of time the Student spent in each time-out procedure and the number of occurrences each day between January 2000 and February 2001.

Corrective Action for Issue #2D

See end of final decision.

Findings of Fact for Issue #2E: The Complainant alleges the time-out for seclusion room (Blue Room) at the Eisenmenger Program is not a safe environment for the Student because the concrete block walls and the tile floor are not covered, and the Student was forced to sit on the bare floor, sometimes for hours at a time.

1. The walls of the Blue Room are concrete block. There are no windows in the walls. The Blue Room door is steel with a vertical window, 6 inches wide by 27.5 inches high. The floor is linoleum without a carpet. There is no furniture in the Blue Room.

2. There are fluorescent lights, a smoke detector, and a sprinkler system on the ceiling. There is no light switch in the Blue Room. The control switches are located immediately outside of the room.

3. See Appendixes A, B, and C for documentation of the length of time the Student spent in each time-out for seclusion in the Blue Room.

4. Documentation prepared by the District indicates the Student banged his head on the concrete walls of the Blue Room as early as April 11, 2000. (See Appendix B). Referral Forms note the Student engaged in head banging on either the concrete walls or the steel door on the following days (See Appendix C):

Sept. 28, 2000	October 16, 2000	January 29, 2001
October 9, 2000	October 17, 2000	January 31, 2001
October 10, 2000	Nov. 1, 2000	Feb. 15, 2001
October 11, 2000	Nov. 24, 2000	

Conclusions for Issues #2E

1. When school districts place students in a time-out for seclusion room, they must provide "a safe environment for the pupil where all fixtures are tamper proof, walls and floors are properly covered, and control switches are located immediately outside the room." Minn. R. 3525.2900, subp. 5 D(6).

2. The standards for safety are not defined more specifically than noted in the above-quoted Minnesota Rule. Safety is determined on a case-by-case basis, because what is safe for one student may not necessarily be safe for another student. For instance, a time-out room with concrete block walls may not be safe for a student known to bang his head on walls.

3. In this case, documentation reveals that starting on April 11, 2000, that the Student banged his head on the concrete walls in the Blue Room. On only one Referral Form dated October 17, 2000, is it noted that a teacher held the Student so he could not injure his head. This action of holding the Student's head indicates knowledge that it is not safe for the Student

to bang his head on concrete block walls, and that ready assistance is needed because of the risk of injury. Therefore, the District put the Student into an unsafe environment with uncovered walls and door on numerous occasions, in violation of Minn. R. 3525.2900, subp. 5 D(6).

4. The evidence shows several occasions the Student spent one to six hours in the Blue Room. The Blue Room has no furniture and no covering over the linoleum. Unless he stood for the length of time he was in the room, he would have had to sit on the floor as the Complainant alleged. While this may have been uncomfortable for the Student, this does not rise to the level of a violation of Minnesota Rules. However, it is questionable practice to confine students in a room of this size and design for such prolonged periods of time. Seclusion for brief periods may be defensible, but not confinement for one to six hours forcing a student into discomfort, making this a punitive, negative intervention. See Minn. R. 3525.0850 for requirements to use positive behavior interventions.

Decision for Issue #2E

The District violated Minn. R. 3525.2900, subp. 5 D(6) when it failed to provide a safe environment for the Student when it placed him in time-out for seclusion.

Corrective Action for Issue #2E

See end of final decision.

ISSUE #3

The Complainant alleges the District failed to develop, review, and revise the Student's IEP. Specifically, the Complainant alleges:

A. The District failed to address the Student's behavioral needs or to develop a behavior intervention plan (BIP) for the Student;

B. The Student has not made progress on his behavioral issues;

C. The Student has many needs, including attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), anxiety, depression, dyslexia, and central auditory and visual processing problems, that are not properly addressed on his IEP.

1. The District acknowledges it did not develop a BIP for the Student from the time he entered Rondo-Eisenmenger in January 2000 until he left in February 2001.

2. In its response, the District stated:

> The IEP developed on 3/30/00 addresses Student's behavioral needs in the areas of on task behavior and following directions. The present level of educational performance indicates a baseline of student's visits to the intervention area. The "Adaptation" section of the IEP indicates the need to use the intervention space and the need for the management system.

3. In its response, the District stated:

> there is evidence to support that the Student did make progress…on behavioral issues….A progress report in November 2000 indicates that the Student's ability to follow directions increased to 80%….On his November [2000] report card, Student was described as better able to handle frustration in the classroom. He

received ratings of "3" (usually uses this skill) in the areas of self-control, listening, work completion, following instructions, accepting feedback, and respecting peers and staff....A graph of intervention referrals indicate that between December, 2000 and January 2001, Student required no seclusionary time-outs or manual restraints. (Chart enclosed.) However, a review of the graph showing [sic] that the Student's behavior deteriorated in February 2001. There was an increase in "leaving the assigned area" and physical aggression. He required out-of-classroom intervention almost daily beginning in February....

4. In its response, the District denied it failed to take into account all of the Student's needs in developing his IEPs. It stated:

> Student was reevaluated in June 1999. The [ESR]...Supports the diagnosis of ADHD for which he receives Ritalin...Contains evaluation data from Gillette Hospital do not [sic] support depression, diagnosis of ODD, dyslexia or central auditory and visual processing problems...Reports from parent and teacher

> placed Student "at risk" for anxiety though no diagnosis of anxiety has been confirmed....The need for nursing services for the provision of mediation [sic] is addressed in the 3/30/00 IEP. Since there is no documentation to support any other areas alleged by the parent, the needs are not addressed in the IEP.

5. As noted in the Findings of Fact for Issue #2B, when the Student started school at Rondo-Eisenmenger, the District had a copy of the "Comprehensive Psychological Evaluation" (1999 Psych Eval) completed by a doctor at Gillette Hospital, when the Student was at Tri-District School in 1999. The District stated:

> The IEP team [at Rondo-Eisenmenger] reviewed and accepted the reevaluation completed at Tri-District School in June, 1999 that included the assessment results of a psychological evaluation by Gillette Hospital.

6. It is noted in the Student's 1999 Psych Eval that the Student "had been variously diagnosed and treated for ADHD, ODD, anxiety, depression, and bipolar disorder." It was also noted that the "[Student] had

been suspended from school for problems with impulsive behaviors (e.g., refusal to stay in classroom, fighting with classmates, physical aggression toward adults, failing to complete schoolwork."

7. The 1999 Psych Eval lists the results of the WISC-III. The Student earned a Full Scale IQ score of 74 (PIQ = 73, VIQ = 80), "which placed his intellectual functioning in the Borderline range."

8. In the 1999 Psych Eval, results of the WJ-R revealed

> **significant deficits of approximately two (2)grade levels in [Student's] academic achievements..., and substantiated some of the processing problems" that may account for some of [Student's] difficulties with behavior and academics in school.** Significant deficits were found in the following areas: "long-term storage of information without significant overlearning...visual processing under time constraints...auditory processing...and non-verbal problem-solving." It was stated that the Student "**would face**

considerable frustration at this time trying to do grade 4-4 academic level work."
(Emphasis added.)

9. Regarding the Student's personality testing, it is noted in the 1999 Psych Eval:

> [Student] appears to not comprehend, remember, or understand how much trouble he has given those he respects and cares for, including teachers, and expressed frustration at not being able to understand the expectations of those around him.

10. The 1999 Psych Eval states the following:

> [Student's] auditory and perceptual skills are in the borderline range. He is at the lower 2 to 4 percent of children his age with respect to overall intellectual skills....He lacks consequential thinking and sequencing skills. In addition, he has minimal inhibitory skills when emotionally overwhelmed....[Student] is two years behind academically, if not more, in some areas....Encouragement and praise is often more important than time out.....I think it is most

critical to get [Student] to have successful academic exercises. He appears to indicate great pride when he has grasped a concept and this in and of itself will build his self-esteem and redirect him along with medication. It is clear that he has Attention Deficit difficulty and he will need to continue on medication....

11. The Student's educational file contains a "Notice of a Team Meeting" dated January 10, 2000, (the day the Student enrolled at Rondo-Eisenmenger) for an IEP team meeting to be held that day "to review and revise the Student's IEP as needed." The Student's team leader stated the team did not discuss developing an IEP on January 10, 2000. The Student's team leader also said the District did not follow the March 1999 IEP, the last IEP the Complainant previously consented to, because they wanted to wait and see what the Student needed.

12. In its response, the District provided an IEP dated March 30, 2000 (March 2000 IEP) approved by the Complainant on the same date.

13. The following adaptations are listed on the Student's March 2000 IEP:

Nursing service is a necessary related service for medication administration and management to maintain [Student's] neuro-behavioral control status and attain his IEP goals....[Student] needs to be in a classroom with a low student to teacher ratio to enable to achieve his academic potential. He needs the use of an intervention space. [Student] benefits from the use of a management system that is concrete and uses rewards.

14. The March 2000 IEP contains the following special education and related services with a start date of March 20, 2000, and an expected duration of one year:

Instruction or Service Provided	Type	Anticipated Frequency	Direct Min. Per Time
Special Education	Special Ed	5 x wk.	335
Nursing	Special Ed	5 x wk.	15
Social Work Services	Special Ed	1 x wk.	30

15. The March 2000 IEP contains the following PLEPs, goals, and objectives:

PLEP	GOAL	OBJECTIVE
Currently [Student] remains on task for an average of 30 minutes in a 45 minute period. When he is on task he is able to ask questions appropriately if he has difficulty with the material. [Student] completes about 7 out of 10 assignments in class. Unfinished work is completed in study hall.	Goal #1 Given a 45 minute period, [Student] will display on task behavior for at least 40 minutes, by following directions, raising his hand to ask for help and working until the task is complete by October 2000. [Student] will increase his number of assignments completed in class from 7 out of 10 to 9 out of 10 by October 2000.	[1] [Student] will raise his hand to ask for help or move on to a question he can answer independently, until an adult is available for assistance, in 4 out of 5 situations. [2] [Student] will follow directions the first time in 4 out of 5 situations. [3] [Student] will complete 9 out of 10 tasks to the satisfaction of the classroom teacher.
Currently [Student] is able to complete 60 multiplication facts in a five minute period (i.e. 7 x 9 = 63). [Student] is also able to complete 60 basic addition facts in a five minute period (i.e. 4 + 8 = 12). [Student] is able to complete 33 basic subtraction facts in a five minute period (i.e. 9 – 3 = 6). [Student] can successfully complete 2 step	Goal #2 [Student] will increase math (computation, application) skills from mid third grade to early fifth grade by October 2000	[1] [Student] will increase basic multiplication and addition facts fluency from 60 correct answers per minute to 85 correct answers per minute as measured by 5 minute timed tests. [2] [Student] will be able to correctly answer 8 out of 10 multi-digit addition and subtraction problems with regrouping independently as measured by teacher

story problems independently. He adds three digit numbers with regrouping successfully. [Student] is performing on a mid third grade level in math.		observation. [3] [Student] will be able to correctly tell the value of a group of coins 10 out of 10 times as measured by teacher observation. [4] [Student] will increase basic subtraction facts fluency from 33 correct answers per minute as measured by five minute timed tests. [5] With the use of manipulatives and pictographs [Student] will correctly solve 8 out of 10 3 step story problems containing math skills he can perform as measured by teacher observation. [6] Given paper and pencil, [Student] will correctly compute 8 out of 10 three by two digit multiplication problems as measured by teacher observation. [7] Given paper and pencil, [Student] will correctly compute 6 out of 10 four divided by one digit division problems as measured by

		teacher observation.
Currently [Student] reads on an early 5th grade level. He is able to understand comprehension questions, including fact and detail, inference, vocabulary and sequencing. [Student] reads at a fluent pace and decodes two and three syllable words independently. He can decode more difficult when cued with a strategy, such as, look for the big words in the little word.	Goal #3 [Student] will increase reading competency from an early 5th grade level to a 5th grade level as measured by teacher observation by October 2000.	[1] Given a 100-word passage at the 5th grade reading level [Student] will read aloud at least 70 cwpm with fewer than three errors as measured by teacher reporting. [2] [Student] will correctly answer five inferential comprehension questions at the 5th grade level in a minute time period as measured by teacher observation. [3] After reading a randomly selected passage at the 5th grade reading level [Student] will verbally retell the story with at least 80% accuracy as measured by teacher's reporting. [4] Given a list of 10 vocabulary words from a 5th grade text, [Student] will match words with their correct meaning with at least 80% accuracy as measured by teacher-made tests. [5] [Student] will correctly answer five fact and detail

		comprehension questions at the 5th grade level as measured by teacher observation.
Currently Student displays behavior that results in an intervention visit an average of 2 times per day. These visits range in length from 12 to 200 minutes. The behaviors preceding the intervention visits relate to the skill of following instructions 9 out of 10 times. [Student] has been dismissed for willful disobedience but this consequence has not been effective. When [Student] chooses to, he is able to follow directions. However, he has expressed that his peers "will not like him if he is good all the time."	Goal #4 [Student] will increase his frequency of following directions from 2 out of 5 days per week to 4 out of 5 days a week by October 2000.	[1] Given a verbal, one step direction (i.e. line up for lunch) [Student] will comply in 9 out of 10 opportunities. [2] Given role play situations in a social skills group, [Student] will practice the skill of following directions successfully in 9 out of 10 opportunities.

16. When asked to provide documentation of the Student's progress toward his annual IEP goals, the District referred to progress notes dated November 2000, and to his November 2000 report card. The November 2000 progress report notes:

> Goal #1: [Student] spends more time on task in the classroom. He solves more problems on his own in math and reads longer reading passages independently. For more information see report card.
>
> Goal #2: [Student] has made some progress but should continue to work toward this goal. For more information see report card. [There are notations on the IEP that objectives #2 and #3 are met.]
>
> Goal #3: [Student] has met this goal. [There are notations on the IEP that objectives #1, #2, #3, and #5 are met.]
>
> Goal #4: Currently [Student] is doing very well. We are considering a mainstream class. [Student] follows directions about 8 out

of 10 times. See report card for more info."

17. The District also provided a copy of the Student's grade six, semester one report card, which notes:

> 4 – Always uses the skill; 3 – Usually uses the skill; 2 – Has the skill, needs to use; and 1 – Is a goal.

Subject	Report Card Grade	Written Comments
Reading	**3+**	**[Student's] reading has improved!**
Mathematics	**3+**	**[Student] is working very hard.**
Written Expression	**3**	**Refuses at times. Does well with timed writing.**
Science	**3+**	**Participation in activities has increased.**
Social Studies	**3+**	**Listens well in class discussions.**
Art/Music	**3/3**	**Tries art directives, at times refuses to do work.**
Physical Education	**4**	**Hard worker. Great attitude!**
Comments		**[Student] is more willing and seems more confident in his academics.**

Behavioral and Social Growth Skills	
Shows a calm/body/self control	3
Uses listening skills	3
Remains on task/completes work	3
Follows instructions	3
Accepts feedback/adult decisions	3
Handles anger appropriately	1
Asks for help/interrupts appropriately	3
Resists peer pressure	2
Respects peers and staff	4
Shows positive self concept	2
Completes and returns homework	4
Organized, neat locker and desk area	4

Comments: [Student] spends significantly less time in intervention this year; however, when he goes it is because **he is verbally or physically aggressive toward other students more often.** [Student] is not confident in his ability to meet goals (i.e. no bottom line behavior for 6 days). [Student] is very organized and works well with other students.

(Emphasis added.)

18. The Student's Rondo-Eisenmenger teacher and his advocate both stated the Student was taught grade five reading and math concepts during the 1999-00 school year, and grade six reading and math concepts during the 2000-01 school year.

19. The Complainant and the Student's advocate state the reading and math concepts taught to the Student in grades five and six at Rondo-Eisenmenger were too difficult for him. He experienced frustration when the work was too difficult for him and, as a result, he engaged in inappropriate behaviors.

20. The Student's educational file does not contain documentation showing an increase in the Student's reading and math abilities during the time he attended Rondo-Eisenmenger.

21. The Student was given the Woodcock Johnson–Third Edition (WJ-III) by his homebound teacher on May 31, 2001. "His academic skills and his ability to apply those skills were both within the low average range, and his fluency with academic tasks was low. His performance was low average in Reading and Mathematics, and low in Math Calculation skills,

Written Language, and Written Expression." Specific percentile rankings were as follows:

CLUSTER	PERCENTILE RANK
Total Achievement	6th
Broad Reading	15th
Broad Math	10th
Broad Written Language	6th
Math Calculation Skills	3rd
Written Expression	4th
Academic Skills	10th
Academic Fluency	8th
Academic Applications	16th

22. In mid-May 2001, the District arranged for an IEE of the Student. The resulting IEE dated August 23, 2001, substantiated the "1999 concerns about [Student's] long-term memory and processing difficulties and his current diagnoses of ADHD, central auditory and visual delays, and dyslexia." She also noted that he was experiencing "significant distress related to depression."

23. According to the IEE, "...At a chronological age of 12 years, 5 months, and 16 days, [Student] obtained a Verbal Scale IQ of 72, a Performance Scale IQ of 103, and a Full Scale IQ of 85 +/- .6 points on the WISC-III. His overall performance is classified in the Low Average range of intellectual functioning, and is ranked at the 16th percentile." It is noted that the Student has difficulties with the following verbal skills: "numerical reasoning ability, short- and long-term memory, concentration and attention, word knowledge and language development, social judgment, and common sense."

24. The IEE indicates the Student did not exhibit the inappropriate behaviors documented by the staff at Rondo-Eisenmenger. "EA [educational assistant] support was clearly beneficial to [Student] in Summer

School, and should be continued for [Student] in the regular academic year if possible."

25. It is also stated in the IEE:

People with fewer effective communication skills often use problem behaviors to communicate their needs. Many children with a "disruptive behavior disorder," including [ODD]…are at increased risk for deficits in effective communication skills. Moreover, psychiatric disorders (such as anxiety or depression) often coexist with the disruptive behavior disorders….Given [Student's] history of difficulties with self-expression (e.g., speech/language deficits), these are important considerations in understanding [Student's] problem behaviors. There is a very strong likelihood that his "problem" behaviors serve a communicative function for [Student].

26. The IEE contains many recommendations for the Student. Among them:

Given [Student's] continuing writing problems and the possibility of unmet sensory needs (as determined by the results of interviews and Motivation Assessment Scales), [Student]

should be provided with a comprehensive Occupational Therapy (OT) evaluation. Results of this evaluation should be carefully considered and implemented.

Conclusions

1. Federal regulation at 34 C.F.R. § 300.350(a) requires school districts to "provide special education and related services to a child with a disability in accordance with the child's IEP." 34 C.F.R. § 300.350(a).

2. The District stated it wanted to get to know the Student before creating a new IEP for him after he enrolled at Rondo-Eisenmenger on January 10, 2000. Upon a student transferring to a new school within a state, districts must implement the last agreed-upon IEP, if one exists, or develop a new IEP. An eligible special education student cannot be left without an effective IEP and/or services in place. In this case, the March 1999 IEP was the Student's last agreed-upon IEP prior to his enrollment at Rondo-Eisenmenger. The District acknowledges it did not implement the March 1999 IEP after the Student started at Rondo-Eisenmenger, and it did not develop a new IEP for the

Student until March 30, 2000. The District failed to implement the March 1999 IEP between January 10 and March 30, 2000, in violation of 34 C.F.R. §300.350(a).

3. Federal regulation at § 300.13 states:

> The term free appropriate public education or FAPE means special education and related services that--
> (a) Are provided at public expense, under public supervision and direction, and without charge;
> (b) Meet the standards of the SEA ...
> (c) Include preschool, elementary school, or secondary education in the State; and
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340-300.350.

4. Federal regulation at 34 C.F.R. § 300.343(c) requires school districts to:

> (1) Review the child's IEP periodically, but not less than annually, to determine

whether the annual goals for the child are being achieved; and

(2) Revise the IEP as appropriate to address –

(i) Any lack of expected progress toward the annual goals…and in the general curriculum, if appropriate;

(ii) The results of any reevaluation…;

(iii) Information about the child provided to, or by, the parents…;

(iv) The child's anticipated needs; or

(v) Other matters.

5. School districts are also required to address the following in preparing an IEP for special education students:

(2) Consideration of special factors.

The IEP team shall –

(i) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

34 C.F.R. § 300.346(2)(i).

6. The documentation in the Student's educational file, available to the District at the time the Student started attending Rondo-Eisenmenger, noted the Student was experiencing behavioral difficulties as follows: refusal to stay in classroom, fighting with classmates, physical aggression toward adults, and failing to complete schoolwork.

7. The March 2000 IEP included two goals pertaining to the Student's inappropriate behaviors. Goal #1 addressed improving on task behavior, completing assignments, and following directions. Goal #4 pertained to following instructions.

8. The evidence provided at Appendixes A, B, and C shows the Student continued to exhibit the following inappropriate behaviors between January 2000 and February 2001: teasing, not following instructions, swearing at the teacher, failing to complete school work, running out of area, fighting with classmates, refusing to do school work, problems controlling anger, spitting on staff, using racial names against another student, threatening suicide, engaging in self-injurious behaviors, threatening other students, ripping papers off of walls, disruptive, etc.

9. While the March 2000 IEP included some behavioral goals, it is difficult to conclude that he made progress on his behavioral goals based on the evidence. The District's November 2000 progress notes state that the Student "spends more time on task in the classroom. [Goal #1] The November 2000 progress notes state that the Student "follows directions about 8 out of 10 times" [Goal #4]. The District points to the Behavior Chart as proof of the Student's progress on his behavioral goals. A review of Appendixes A, B, and C, however, reveals the Behavior Chart substantially understates the number of times the Student was removed from his classroom and was placed in the intervention area. Additionally, a review of Appendix C shows that by February 2001, the Student was being placed in the intervention area almost exclusively for failure to follow instructions. Some days he was placed in the intervention area two times a day for failing to follow instructions. Between February 1 and February 15, 2000, he was placed in the intervention area 12 times for failing to follow instructions.

10. As shown in Issue #2, during the time the Student was at Rondo-Eisenmenger, the Student's lack of success should have prompted a reevaluation to allow

the IEP team to review and, if appropriate, revise the Student's IEP to address his many behavioral needs, how this was impeding his and other students' ability to learn, and strategies and interventions to address his behavioral needs. Additionally, the District did not prepare a conditional behavior plan for the Student between January 10, 2000, and February 15, 2001. Instead, the District used the IEP developed on March 30, 2000, unchanged, until the Student stopped attending Rondo-Eisenmenger on February 15, 2001.

11. The Student's IEP team did not meet at any time between March 2000 and February 2001 to review and, if necessary, revise the Student's IEP to appropriately address the Student's behavioral needs, in violation of 34 C.F.R. § 300.343(c).

12. Special education means specially designed instruction to meet the needs of a child with a disability. *See* 34 C.F.R. § 300.26(a)(1). Specially-designed instruction also means adapting the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum. *See* 34 C.F.R. § 300.26(b)(3)(i) and (ii).

13. The other two goals on the Student's March 2000 IEP pertain to math and reading: increasing math skills from mid-third grade to early fifth grade by October 2000 (Goal #2), and increasing reading competency from an early fifth grade level to a fifth grade level by October 2000 (Goal #3). These goals remained unchanged throughout the time the Student was at Rondo-Eisenmenger, even though he was in grade six from September 2000 through February 2001. When the Student started grade six, the evidence demonstrates his teacher taught him grade six math and reading concepts even though he had not completely met the goals requiring him to reach a fifth grade level in both subjects. The Complainant and the Student's advocate state the Student experienced frustration when the work was too difficult for him, which often resulted in acting out behaviors. A review of Appendixes A, B, and C shows frequent work refusal resulting in being removed from the classroom.

14. The Student's March 2000 IEP does not mention that as of 1999, the Student had "significant deficits of approximately two grade levels in…academic achievement. He would face considerable frustration at this time trying to do grade 4-4 academic work." It

was also noted in the 1999 Psych Eval that "specific reading testing revealed a major disability in decoding sequential sound/symbol relationships" that "strongly suggests a specific reading disorder (Dyslexia)." It was noted that "to the extent that school work is dependent upon reading, spelling, and writing, [Student] is likely to encounter considerable frustrations in these areas...," and "significant difficulties were…found in long-term storage of information without significant overlearning. The information that he can retrieve short-term takes a significant amount of time to get sorted into long-term memory." The Student showed a "significant deficit in visual processing under timing constraints. A significant deficit with respect to auditory processing was indicated….[He] is delayed…by about two years in non-verbal problem solving….The [Student's] auditory and perceptual skills are in the borderline range." It was also noted that "the results of the Woodcock-Johnson Test of Cognitive Ability substantiate some of the processing problems that may account for [Student's] difficulty in school as well as some of his behavior problems…."

15. In order to ensure a student with a disability receives FAPE, school districts must ensure that the "services

provided to the child...address all of the child's identified special education and related services needs." *See* 34 C.F.R. § 300.300 (a)(3)(i).

16. A review of the March 2000 IEP shows the IEP does not contain adaptations in the content, methodology, or delivery of math and reading instructions to address the unique needs of the Student that result from the child's disability.

17. The Student's March 2000 IEP did not contain provisions to assist the Student with dyslexia, auditory processing difficulties, visual processing difficulties, and functional skills, of which the District had knowledge.

18. The District did not provide the Student with adequate services to address all of his behavioral and academic needs arising from his disabilities during the time he attended Rondo-Eisenmenger from January 2000 through February 2001, denying him a FAPE, in violation of 34 C.F.R. § 300.300 (a)(3)(i), for which make-up services are implicated.

Decision

The District violated 34 C.F.R. § 300.350(a) when it failed to implement the Student's IEP between January 10 and March 30, 2000.

The District violated 34 C.F.R. § 300.343(c) when it failed to convene an IEP team meeting to review and, if necessary, revise the Student's IEP to appropriately address the Student's behavioral needs.

The District violated 34 C.F.R. 34 C.F.R. § 300.300 (a)(3)(i) when it did not provide the Student with adequate special education services to address all of his identified special education needs between January 10, 2000, and February 15, 2001, denying him a FAPE.

Corrective Action

See end of final decision.

ISSUE #4

The Complainant alleges in March 2000, the Student's teacher changed the Student's disability category from other health impaired (OHI) to

emotional behavioral disorder (EBD) without following the proper procedures related to disability eligibility criteria. Specifically, the Complainant alleges the Student's teacher told her the Student could receive more services if he was in the category of EBD rather than OHI. Additionally, the Complainant alleges this change from OHI to EBD was not based on the Student's individual needs.

Findings of Fact

1. In its response, the District stated:

> Prior to re-entry into the St. Paul Public School District (SPPS), a re-evaluation of the Student was completed in June, 1999 at Tri-District School. The re-evaluation indicated that the Student met eligibility for E/BD and SLD, thus, the IEP team at Tri-District changed the disability category from OHI. Upon re-enrollment in Saint Paul in January, 2000, the IEP team at Rondo Eisenmenger reviewed the ESR and determined that the report properly documented eligibility for E/BD and SLD. At the February, 2001 IEP team meeting, Student's mother reported [sic] questioned the change in

disability from OHI to E/BD. According to the team leader at the Rondo Eisenmenger, school members of the IEP team indicated to the Student's mother their continued agreement supporting the decision of the Tri-District's IEP team and that his needs could be are met [sic] under the current eligibility and that the OHI disability category did not mean more services. Staff told the mother that neither disability category meant more services because services are based on the individual needs of the student.

2. The Student received services throughout elementary school with a primary disability of OHI.

3. The Student's educational records contain the 1999 Proposed IEP, prepared by Tri-District, with the Student's primary disability listed as EBD. On a Notice of Proposed Education Services dated December 16, 1999, the Complainant signed on January 4, 2000, indicating she did not give Tri-District permission to proceed as proposed. The Complainant states she told Tri-District personnel she objected to the change from OHI to EBD.

4. When the March 2000 IEP was developed, the Student's eligibility category was changed from OHI to EBD. This was his primary disability category during the time he was at Rondo-Eisenmenger.

5. The Complainant signed a Notice of Proposed Special Education Services on March 30, 2000, giving the District permission to proceed with the implementation of the March 2000 IEP that included a disability category of EBD for the Student.

Conclusions

1. A student's disability category is determined as the result of an evaluation indicating the Student's special education and related service needs. *See* 34 C.F.R. § 300.320. Once the child is evaluated, the IEP team determines whether the student meets eligibility criteria as a child with a disability for a particular disability category. *See* 34 C.F.R. § 300.7.

2. School districts must inform parents in writing if they propose to change the identification of their child with a disability. The basis for such a proposal is a written evaluation report and proposed IEP. Among other things, the written notice for a proposed IEP

must include a description of the action proposed, an explanation of why the school district proposed to change the student's identification, a description of other options considered, a description of each evaluation, test, record, or report used as a basis for this proposed action, and a description of other factors that are relevant. *See* 34 C.F.R. § 300.503.

3. The Complainant signed a Notice of Proposed Special Education Services on March 30, 2000, giving the District permission to proceed with the implementation of the March 2000 IEP that included a disability category of EBD for the Student. The Notice, however, did not contain an explanation of why the District proposed to change the student's identification, a description of other options considered, a description of each evaluation, test, record, or report used as a basis for this proposed action, and a description of other factors that are relevant, in violation of 34 C.F.R. § 300.503.

Decision

The District violated 34 C.F.R. § 300.503 when it failed to provide the proper written notice to the Complainant before changing the Student's disability category.

Corrective Action

See end of final decision.

Corrective Action for Issues #1, #2, #3, and #4

1. The District asserts it has taken the following corrective action:

   A. Notified the team teachers at all the Eisenmenger sites and support staff of the violations in the use of conditional procedures.
   B. Trained the staff at Rondo-Eisenmenger in the due process procedures required when a conditional procedure is used.
   C. Provided all Rondo-Eisenmenger team teachers with a help sheet to provide assistance in implementing conditional procedures and development of BIPs.
   D. Held informational meetings with parents at each site on the BEST management system as it is currently implemented.

2. Within 14 calendar days of the date of this final decision, the District must submit written evidence of

the corrective actions noted in #1 above have been implemented and completed.

3. The District proposes the following additional corrective action:

   A. Convene IEP meetings at all Eisenmenger sites to develop BIPs for students, where appropriate.

   B. Train staff at remaining Eisenmenger sites in due process procedures required when a conditional procedure is used.

   C. Send a memorandum to all staff who utilize intervention space for seclusive time-out. The memorandum must explain that the use of this space must be documented on the IEP.

4. The District's proposed corrective action is accepted, with the following clarification:

   A. Within 45 calendar days of the date of this final decision, the District must submit documented evidence of the IEP meetings mentioned in #3A above to CFL.

B. Within 10 calendar days of the date of this final decision, the District must submit a proposed agenda and schedule to CFL regarding the training for staff at the Eisenmenger sites. The information must include the names of the people who will receive the training, the person who will conduct the training, the topics to be covered, and the proposed date(s) for the training. The training must include the following state and federal regulations:

34 C.F.R. § 300.13 Free Appropriate Public Education

34 C.F.R. § 300.26 Definition of Special Education

34 C.F.R. § 300.300 Addressing all of students' special education needs

34 C.F.R. § 300.343(c) Revision of IEPs

34 C.F.R. § 300.346 Consideration of special factors

34 C.F.R. § 300.350(a) IEP Accountability

34 C.F.R. § 300.503 Parental notice

Minn. R. 3525.2810 Development of IEP Plan

Minn. R. 3525.2900, subp. 5 - The IEP and regulated interventions

C. The District must complete the required training within 14 calendar days of CFL approval on the proposed agenda.

5. The District must schedule a facilitated IEP team meeting through the Minnesota Special Education Mediation Service (MNSEMS). The facilitator is a neutral person employed by MNSEMS. MNSEMS will cover the costs for the facilitator. In addition to the usual IEP team participants, a school nurse and a District OHI specialist must be in attendance. The date for the facilitated IEP team meeting is to be based on the schedules of all parties who must attend the meeting, but it should be held, if possible, within 20 days of the date of this final decision.
6. One of the purposes of the facilitated IEP team meeting is to review the Student's IEP, and revise it if necessary, to ensure that he is receiving services based on his various identified special education needs. The most recent IEE completed in May 2001, and the testing performed by his homebound teacher in May 2001, should be the main focus of the IEP team's inquiry. The recommendations and results in the reports resulting from these two sources must be considered by the team. The IEP team must take particular care to ensure that the Student is receiving

appropriate math and reading at his individual level, and that his needs for an educational assistant are being met. The IEP team must also consider ways to ensure the Student receives counseling for his depression as noted in the recent IEE Report. The IEP team must consider whether the Student needs an additional assistive technology evaluation. If it is determined that the Student needs an assistive technology evaluation, the District must conduct one immediately. The District must inform CFL of the results of the facilitated IEP team meeting within five calendar days of its completion.

7. If the District has not already done so, it must conduct an OT evaluation for the Student. If the District has recently conducted such an OT evaluation, the District must make the resulting report available to all attendees at the facilitated IEP team meeting. The IEP team must determine if the OT evaluation was sufficient, or if further evaluation is indicated. If further testing is warranted, the District must arrange for an OT evaluation at the earliest possible time.

8. The Student's identified special education needs were not adequately addressed while the Student attended Rondo-Eisenmenger from January 10, 2000, through

February 15, 2001, resulting in a denial of FAPE for this time period. The Student is owed one year of make-up services as compensatory education. The District must immediately contact the Complainant and arrange a meeting to ask for her input into ways the District can address this failure. The Complainant must be afforded the opportunity to have an advocate or other persons of her choosing available at the meeting. The meeting must be at a time and location convenient to the Complainant. These make-up services may include mental health counseling, one-on-one tutoring in areas of need, or social opportunities, as agreed upon. These services may be provided over the summer or at other times convenient to the Complainant and the Student. The purpose of these make-up services is to eventually bring the Student to the performance levels he should have reached had adequate services been provided. If the District and the Complainant cannot agree on appropriate make-up services for the Student, the District must inform CFL of the reason for the impasse, and the positions of the parties, within five calendar days of the impasse, and CFL will make the final determination.

The authority to review complaints is given in the federal regulations to the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. §§ 300.660-.662. Questions about this decision should be directed to the complaint investigator, [Investigator]. If the Complainant has subsequent concerns about the District's implementation of the corrective action, he/she should contact due process specialist, [Due Process Specialist].

Sincerely,

Darren G. Kermes, Esq.
Acting Manager
Division of Accountability and Compliance

Appendix A

The following table contains the information recorded in the Log for the Student for September 5, 2000 through February 15, 2001:

Date	Time In	Time Out	Total Time Spent in Time-Out (Time calculated by complaint investigator)
9/14/00	1:10	1:29	18 minutes
9/15/00	12:55	1:15	20 minutes
9/21/00	12:10	12:50	40 minutes
9/27/00	9:20	12:15	2 hours, 55 minutes [Note: handwriting faint. May be student with similar name.]
9/27/00	3:10	3:30	20 minutes
9/28/00	2:24	2:35	11 minutes
10/2/00	12:47	1:44	57 minutes
10/2/00	3:00	3:00	0 minutes
10/3/00	[not listed]	[not listed]	[unable to calculate]
10/5/00	11:50	1:20	1 hour, 30 minutes
10/9/00	3:30	[crossed out]	[unable to calculate]
10/10/00	9:25	3:30	6 hours, 5 minutes
10/16/00	1:55	3:30	1 hour, 35 minutes
10/18/00	1:10	[crossed out]	[unable to calculate]
[not listed]	9:25	9:40	15 minutes
10/25/00	11:15	11:55	40 minutes
10/27/00	11:45	1:00	1 hour, 15 minutes
11/1/00	11:45	[crossed out]	[unable to calculate]
11/2/00	11:50	11:54	4 minutes
11/2/00	1:10	2:04	54 minutes

11/6/00	12:00	12:50	50 minutes
11/9/00	11:00	11:15	15 minutes
11/13/00	1:30	1:40	10 minutes
11/14/00	12:00	1:45	1 hour, 45 minutes
11/14/00	3:25	[not listed]	[unable to calculate]
11/16/00	12:05	12:10	5 minutes
11/16/00	1:35	1:45	10 minutes
11/17/00	2:55	3:30	35 minutes
11/21/00	10:30	105:	15 minutes
11/21/00	11:10	1:00	1 hour, 50 minutes
11/29/00	9:50	[not listed]	[unable to calculate]
12/4/00	9:40	10:05	25 minutes
12/5/00	9:20	9:30	10 minutes
12/19/00	9:25	10:00	35 minutes
12/21/00	12:45	12:55	10 minutes
1/9/01	2:00	[not listed]	[unable to calculate]
1/10/01	9:10	11:45	2 hours, 35 minutes
1/11/01	12:15	1:00	45 minutes
1/11/01	2:45	2:50	5 minutes
1/11/01	3:12	3:30	18 minutes
1/18/01	11:45	1:35	1 hour, 50 minutes
1/29/01	11:00	11:15	15 minutes
1/29/01	11:20	11:30	10 minutes
1/29/01	1:40	1:55	15 minutes
1/30/01	3:10	3:30	20 minutes
1/31/01	9:20	2:00	4 hours, 40 minutes
2/2/01	12:35	1:00	25 minutes
2/5/01	10:00	10:20	20 minutes
2/5/01	12:30	3:30	3 hours [see next entry – contradictory]
2/5/01	2:37	3:00	23 minutes
2/6/01	[not listed]	[not listed]	[unable to calculate]
2/6/01	9:30	11:40	2 hours, 10 minutes

2/6/01	1:15	2:10	55 minutes
2/7/01	9:45	10:20	35 minutes
2/7/01	11:48	1:00	1 hour, 12 minutes
2/7/01	2:20	2:28	8 minutes
2/9/01	12:30	1:01	31 minutes
2/13/01	11:55	12:55	1 hour
2/15/01	11:45	11:45	0 minutes

The complaint investigator calculated the following:

Total times Student placed into intervention area = 59

Total time Student spent in intervention area = incomplete information – unable to calculate

Average length of each time spent in intervention area = incomplete information – unable to calculate

Appendix B

The following table contains relevant information from the Referral Forms for the 1999-00 school year. Footnotes include relevant descriptions of behavioral incidents, and information obtained from some Notes Home.

Date	Time In	Time Out	Where	Skill Area
1/12/00	10:50	11:10	Hallway	Handling teasing
2/1/00	1:45	2:50	Classroom	Following Instructions
2/3/00	1:02	3:30	Hall	Calm Body/Self Control Handling Anger
2/8/00	11:15	11:25	Classroom	Calm Body/Self Control Handling Anger
2/8/00	12:40	1:35	Classroom	Calm Body/Self Control Handling Anger
2/9/00	11:55	11:59	Classroom	Following Instructions
2/9/00	1:15	3:30	Classroom	Following Instructions
2/10/00	10:55	3:30	Classroom	Being on Task
2/14/00	11:02	11:05	Classroom	Following Instructions
2/14/00	11:32	12:05	Classroom	Following Instructions
2/16/00	11:25	11:45	Classroom	Following Instructions
2/16/00	2:25	2:40	Classroom	Following Instructions
2/17/00	2:15	[not listed]	Gym	Handling Anger Following Instructions
2/22/00	12:10	3:30	Art Room	Calm Body/Self Control Following Instructions Being on Task
2/24/00	9:45	[not listed]	Art	Calm Body/Self Control
2/25/00	10:45	11:25	Classroom	Being on Task
2/25/00	11:55	[not	Classroom	Calm Body/Self Control Following

		listed]		Instructions
2/25/00	12:23	[not listed]	Classroom	Following Instructions
2/28/00	1:43	2:40	Classroom	Calm Body/Self Control Following Instructions
3/2/00	12:25	1:05	Classroom	Following Instructions
3/3/00	10:20	10:30	Art	Following Instructions
3/3/00	12:20	1:55	Classroom	Calm Body/Self Control Following Instructions
3/6/00	10:25	10:35	Art Room	Calm Body/Self Control Following Instructions
3/7/00	1:25	1:35	Classroom	Calm Body/Self Control
3/10/00	12:10	1:42	Classroom	Following Instructions
3/13/00	1:10	1:30	Classroom	Following Instructions
3/13/00	2:10	3:30	Classroom	Following Instructions
3/13/00	2:50	3:30	Classroom	Following Instructions
3/15/00	10:19	10:30	Art Class	Following Instructions
3/16/00	10:30	10:40	Art Class	Following Instructions
3/16/00	12:55	1:55	Lunch	Calm Body/Self Control Following Instructions
3/17/00	9:20	9:30	Classroom	Following Instructions
3/17/00	1:15	1:30	Classroom	Following Instructions
3/20/00	9:00	9:30	Classroom	Following Instructions
3/20/00	10:36	3:30	Hallway	Following Instructions
3/21/00	9:00	3:30	Hallway (out of area)	Calm Body/Self Control Following Instructions
3/22/00	9:00	10:20		Following Instructions
3/23/00	10:30	10:37	Classroom	Following Instructions
3/24/00	12:00	12:07	Class	Following Instructions
3/27/00	3:10	4:30	Gym	
3/28/00	1:00	1:12	Lunch	Calm Body/Self Control Following

				Instructions
4/11/00	10:20	11:10	Classroom	Calm Body/Self Control Following Instructions
4/11/00	11:30	12:05	Classroom	Calm Body/Self Control Following Instructions
4/11/00	1:15	1:25	Class	Following Instructions
4/11/00	2:05	3:30	Class	Being on Task
4/14/00	12:00	12:30	Awards	Calm Body/Self Control Following Instructions
4/14/00	1:15	1:25	Class	Handling Anger Being on Task
4/17/00	10:00	11:00	Hallway	Resisting Peers
4/18/00	11:47	11:43	Art	Calm Body/Self Control Being on Task
4/18/00	12:55	2:30	Lunch	Calm Body/Self Control Following Instructions
4/27/00	2:05	3:30	Class	Following Instructions
5/3/00	10:45	11:00	Hallway	Handling Anger
5/4/00	1:05	1:13	Classroom	Accept. Correct.
5/8/00	11:55	3:30	Lunch	Calm Body/Self Control Being On Task
5/8/00	11:45	12:00	Outside	Calm Body/Self Control Following Instructions
5/9/00	12:07	1:05	Art	Calm Body/Self Control Following Instructions
5/15/00	11:10	11:40	Classroom	Following Instructions
5/15/00	12:18	12:25	Class	Calm Body/Self Control Being On Task
5/15/00	12:50	3:30	Lunch	Being on Task
5/18/00	12:10	12:20	Hall	Following Instructions
5/18/00	12:49	3:30	Hall	Calm Body/Self Control Being On Task
5/22/00	9:56	10:24	Art room	Following Instructions
5/23/00	12:05	1:00	Class	Following Instructions
5/25/00	10:40	10:52	Classroom	Calm Body/Self Control Following Instructions
5/25/00	11:50	12:15	Classroom	Calm Body/Self Control Following

				Instructions
5/31/00	12:14	3:30	Hall	Calm Body/Self Control
6/5/00	10:05	10:30	Art/ Outside	Calm Body/Self Control Following Instructions
6/6/00	11:15	2:00	Classroom	Calm Body/Self Control Handling Anger
6/7/00	10:30	10:32	Class	Calm Body/Self Control Handling Anger
6/12/00	3:00	3:30	Recess	Handling Anger

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[1] Student was dismissed from school.

[2] A Note Home from the Student's educational records for February 25, 2000, states the Student went to intervention in the morning for about two hours for swearing at the teacher.

[3] A Note Home from the Student's educational records dated March 3, 2000, states the Student spent most of the afternoon in intervention room.

[4] The description of the behavioral incident states: "When the group was on their way upstairs from Art, [Mr. J] asked [Student] several times to walk back and try it again because he was walking into pictures in the hallway. He then chose to go to intervention. [Mr. J] then told [Student] that if he wasn't with him when he signed him in he would be out of area. **[Student] started banging head while being held."** (Emphasis added.)

[5] The description of the behavioral incident states: "[Student] started in IV [Intervention], because he had make up work to do, and didn't finish the work all day. He went back & forth between Study Hall Y& IV, ran out of area into the hall, had

to be put into seclusion....Use of seclusion room 20 minutes [with physical guidance by 2 staff]."

[6] "[Student] started in IV because he had make-up work to do."

[7] Student refused to complete his reading.

[8] Student was refusing to do work or accept help with his work. His behavior escalated, and **he was placed in the isolation room where he banged his head on the wall.** (Emphasis added.) The teacher restrained him.

[9] "[Student] left the group without permission....He then took off on the run." Student was dismissed and suspended.

[10] Student would not follow along in the book for reading.

[11] Student left lunchroom without permission. Use of manual restraint. Two minutes. Single basket hold.

[12] Student wanted to see teacher and would not sit in his seat when asked. Throwing books, swearing, "kicked Mr. J. in the leg a couple of times."

[13] [Student] was not calm all the way to lunch he needs to do some skill sheets. While in intervention [Student] and [another student] were fighting." Consequence – dismissal.

Appendix C

The following table contains relevant information from the District's Referral Forms for the Student for the 2000-01 school year. Footnotes include relevant descriptions of behavioral incidents, and information obtained from Notes Home.

Date	Time In	Time Out	Where?	Skill Area
9/14/00	1:10	1:29	Classroom	Following Instructions
9/15/00	12:55	1:18	Class	Accept. Correct.
9/21/00	12:10	12:50	Classroom	Accept. Correct.
9/27/00	3:10		Classroom	Following Instructions
9/28/00	9:15	11:45		Handling Anger
9/28/00	2:24	2:35	Outside	Following Instructions
10/2/00	12:47	1:44	Hallway	Calm Body/Self Control
10/2/00	3:30		Outside	Handling Anger
10/3/00				
10/5/00	11:50	1:20	Classroom	Following Instructions
10/6/00				
10/9/00	3:30	3:30	Classroom	Handling Anger
10/10-10/11/00	9:00	1:30	Hallway	
10/16/00	1:55	3:30	Classroom	Handling Anger
10/17/00	1:10	2:02	Art Room	Handling Anger
10/18/00	1:10	2:02	Art Room	Handling Anger
10/23/00	9:25	9:40	Classroom	Following Instructions
10/25/00	11:15	11:55	Playground	Handling Anger
10/25/00	1:45	3:30	Outside	Calm Body/Self Control Handling Anger
10/26/00				
10/27/00	11:40	12:00	Playground	Handling Anger
10/27/00	12:15	1:00	Interventio n Room	Following Instructions
10/27/00	2:37	3:04	Classroom	Calm Body/Self Control Being on Task
11/1/00	11:45	3:30	Classroom	Being on Task
11/2/00	9:10	10:30		

11/3/00	11:50	11:54	Class	Teasing
11/3/00	1:10	1:40	Class	Handling Anger
11/6/00	12:00	12:50	Group Rm.	Handling Anger
11/9/00	11:04	11:15	Classroom	Following Instructions
11/13/00	1:30	1:45	Classroom	Being on Task
11/14/00	12:00	1:45	Classroom	Following Instructions
11/16/00	12:05	12:10	Library	Handling Teasing
11/16/00	1:35	1:45	Class	Following Instructions
11/20/00	2:40	3:30	Classroom	Following Instructions
11/21/00	10:35	10:45	Classroom	Being on Task
11/21/00	11:10	1:00	Class	Following Instructions
11/24/00	9:52	3:30	Classroom	Calm Body/Self Control
12/4/00	9:40	10:05	Classroom	
12/4/00	1:00	1:05	Hallway	Calm Body/Self Control
12/5/00	9:20	9:30	Hallway	Following Instructions
12/18 – 12/19/00	9:25	10:00	Class	Following Instructions
12/21/00	12:45	12:55	Classroom	Handling Anger
1/9/01	2:00	2:34	Classroom	Following Instructions
1/11/01	12:15	1:00	Class	Being on Task
1/16/01	3:12	3:30	Classroom	Accept. Correct.
1/18/01	11:50		Class	Being on Task
1/18/01	1:53		Art Room	Listening Following Instructions
1/23/01	10:35	1:00		Following Instructions
1/23/01	1:50	3:30	Art	Listening Following Instructions
1/26/01	12:05	Dismissed	Class	Handling Teasing
1/29/01	10:40	11:15	Class	Being on Task
1/29/01	11:15	1:30	Class	Following Instructions
1/29/01	1:35	1:55	Art Room	Handling Anger Following Instructions
1/30/01	3:10	3:30	Classroom	Handling Anger
1/31/01	9:30		Breakfast	Being on Task
2/2/01	12:35	1:00	Lunch	Following Instructions

2/3/01	2:20	2:30	Classroom	Following Instructions
2/5/01	10:00	10:20		Following Instructions
2/5/01	12:32	3:30	Lunch	Following Instructions
2/5/01	2:37	3:00	Classroom	
2/6/01	9:30	11:40	Lunch	Following Instructions
2/6/01	1:15		Music	Following Instructions
2/7/01	9:45	10:37	Class	Following Instructions
2/7/01	11:38	12:00	Playground	Handling Anger
2/7/01	2:20	2:30	Classroom	Following Instructions
2/9/01	12:30	1:00	Class	Handling Anger
2/15/01	11:45	3:30	Class	Following Instructions Accept. Correct.

[1] Student was dismissed from school.
[2] A Note Home from the Student's educational records for February 25, 2000, states the Student went to intervention in the morning for about two hours for swearing at the teacher.
[3] A Note Home from the Student's educational records dated March 3, 2000, states the Student spent most of the afternoon in intervention room.
[4] The description of the behavioral incident states: "When the group was on their way upstairs from Art, [Mr. J] asked [Student] several times to walk back and try it again because he was walking into pictures in the hallway. He then chose to go to intervention. [Mr. J] then told [Student] that if he wasn't with him when he signed him in he would be out of area. **[Student] started banging head while being held."** (Emphasis added.)
[5] The description of the behavioral incident states: "[Student] started in IV [Intervention], because he had make up work to do, and didn't finish the work all day. He went back & forth between Study Hall Y& IV, ran out of area into the hall, had to be put into seclusion....Use of seclusion room 20 minutes [with physical guidance by 2 staff]."
[6] "[Student] started in IV because he had make-up work to do."

[7] Student refused to complete his reading.
[8] Student was refusing to do work or accept help with his work. His behavior escalated, and **he was placed in the isolation room where he banged his head on the wall.** (Emphasis added.) The teacher restrained him.
[9] "[Student] left the group without permission....He then took off on the run." Student was dismissed and suspended.
[10] Student would not follow along in the book for reading.
[11] Student left lunchroom without permission. Use of manual restraint. Two minutes. Single basket hold.
[12] Student wanted to see teacher and would not sit in his seat when asked. Throwing books, swearing, "kicked Mr. J. in the leg a couple of times."
[13] [Student] was not calm all the way to lunch he needs to do some skill sheets. While in intervention [Student] and [another student] were fighting." Consequence – dismissal.
[14] **A Note Home from the teacher lists no time spent in intervention.** (Emphasis added.)
[15] "Name calling to staff/swearing, spitting on staff. Racial names at another student. **Restrained for 1 minute. 30 minutes total in blue room on 3 different occasions.**" (Emphasis added.) On back of Referral Form it states: "**11:25 am brought into blue room! – [Student] had SIBs (self injurious behavior) for a solid 10 minutes hitting his head on the door and the wall. 'I'm gonna kill myself' 'I'm gonna run away'"** (Emphasis added.)
[16] The behavior problem occurred at the end of the day on October 2, 2000. When the Student came to school on October 3, 2000, he had to go to the Intervention Room at the start of the day.
[17] There is no Referral Form, but a Note Home indicates the Student spent two minutes in intervention.
[18] "[Student] repeatedly refused to work on his math."
[19] **There is no Referral Form, but in a Note Home, the teacher commented** (quoted in its entirety): "[Student] had a pretty good day. He did a good job in reading. **He had a problem but he turned it around and was able to come back to the class** and finish his day with a positive attitude." (Emphasis added.)

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[20] "[Student] became upset with another student….[and] started to insult him. When the other child responded [Student] jumped at him and threatened him. When [Student] was told to go to intervention he refused. Mr. B. came into the room & [Student] knocked over a desk and a chair….**Should start off day in intervention room. (OVER) 10:38 am SIB (self injurious behavior) [Student] was in the seclusion room banging his head. 10:53 am 'I'm going to kill myself.' 11:15 am head banging in seclusion. 12:10 p Refused meds."** (Emphasis added.)

[21] Student dismissed at 1:30 on October 10, 2000, **"[Student] kicked over a computer cart and ripped down different papers on the wall in the hallway. *verbal threats towards staff. (escorted) *9.46 SIB's (hitting head on seclusion room door) *Seclusion room 1130-1155 threatening behavior threatening students repeatedly disruptive 1245 [Student] restrained (5 min.) threatening another student, tried to go on the run."** (Emphasis added.)

[22] **Use of Seclusion Room…."While in the isolation room [Student] was bumping his head up against the wall."** (Emphasis added.)

[23] Student was sent out of room because he refused to do his work. "**He put himself in the blue room. Mr. F. took his football. He started banging his head. Mr. B. held him so he could not hit his head."** (Emphasis added.)

[24] This may be a form duplicative of the one for October 17, 2000. The date for this one seems to be written over the date "10/17/00."

[25] **There is no Referral Form, but a Note Home from the teacher shows the Student spent 20 minutes in intervention.** (Emphasis added.)

[26] Student was swearing at another student.

[27] "[Student] was sent to a stop and think he refused to take it….**12:15-12:30 [Student] is banging his head on the seclusion room door saying 'I'm going to kill myself, I hope I die.' 12:35 Mr. F. talked with [Student] and [Student] agreed to take his meds. [Student] grabbed his meds. and stomped on them until they were powder. 1:00 p.m. [Student] is still in the blue room singing "I want to kill myself. I hope I die."** (Emphasis added.)

[28] "[Student] took care of his make up work from yesterday."

[29] **A Note Home stated the Student spent no time in intervention.** (Emphasis added.)

[30] **"[Student] refused to do his math…."** (Emphasis added.)

[31] **"[Student] was refusing to do his reading…."** (Emphasis added.)

[32] "[Student] was told to take a stop and think. He refused. I went to escort him out. He started kicking and screaming. [Student] spit in my face…. **[Student] while in the blue room spoke of killing himself several times. He also banged his head in the seclusion room several times (self inflicted)."** (Emphasis added.)

[33] Student refusing to do work (writing in journal).

[34] End time not filled in. "**Refused to do math….[Student] while in the blue room said he was going to kill himself a # of times (put shoelaces around neck….*[Student] ran out of intervention. Staff…restrained him (basket hold) back to intervention….Ran out of intervention room again….2-person restraint….blue room 12:10…."** (Emphasis added.)

[35] End time not included.

[36] He was being teased and would not stop teasing another student. "He then was sent to IV instead of S & T he then tipped his desk over ran out in the hall tore something off the wall & threw a chair across the IV room."

[37] "[Student] refused to pick up his paper and then threw a book down the hall….**head banging."** (Emphasis added.)

[37] "[Student] refused to pick up his paper and then threw a book down the hall....**head banging.**" (Emphasis added.)

[38] No "out time" on Referral Form. "Left breakfast without permission....[Student] was threatening to run, in the hall with his jacket on. He was given the option to make it back to IV on his own or staff would help him. He was given several minutes. Staff then needed to transport [Student] to the blue room. **11:20 a.m. [Student] has been banging his head, provoking the kids in the stalls.** (Emphasis added.) [Student] came out of the blue room @ 12:00, ate his lunch & proceeded to wander the halls again. It's now 1:00 pm and [Student] is refusing to take his meds and is still in a stall."

[39] Work refusal.

[40] Work refusal. **A Note Home stated Student spent 55 minutes in intervention.** (Emphasis added.) The teacher's comments on the Note Home: [Student] had an intervention today but he took care of it right away. I would like him to be as on task in all subjects as he is in reading.

[41] No end time listed.

[42] "[Student] became angry when some girls stepped on his coat on the playground. He swore at them....As he was coming in the building he threw snowballs at them. He then swore at staff, classmates and he threatened another student...."

[43] [Student] was escorted to the intervention area because he refused to take a stop and think in class. **A Note Home** said he spent no minutes in intervention, and the **teacher commented that the Student had a great day.** (Emphasis added.)_

[44] "[Student] wanted to go to intervention. I said he could take a chill of 4 min. or less. He said, "It's not going to be a chill. I am staying." I told him to stop before he left the room. He would not. On his way down the hall I told him to stop or he would need to eat lunch upstairs. He continued to walk to IV. This is the 2nd time he has been wandering the halls today." The following notation is in a different handwriting on the back of the document: "**[Student] was transported to the blue room (2 staff carry) once in the blue room [Student] banged his head on the cement wall and the door for over 10 minutes."** (Emphasis added.) There is a separate typed sheet stapled to the back of the document. It states: "After coming back to class after taking a "chill" in Intervention (less than 4 minutes), [Student] was asked to take a "stop and think" for swearing about doing his reading. He refused to take a stop and thing and Mr. P. asked [Student] to go to Intervention – and gave him 2 minutes to get there on his own. [Student] ran under the table in Ms. A's room. Mr. W. and Mr. P. stood at the end of the table so [Student] could get out one way. [Student] ran to the door and Mr. P. took [Student] by one arm to escort him to Intervention, since [Student] has a history of running out of the area. In the hallway, [Student] threw a book at Mr. P. and hit Mr. P. He then threw a punch at Mr. P. and missed...that's when Mr. P. and Mr. J. transported [Student] to the Intervention room. Once we got to Intervention, [Student] was put in the blue room. He spit on Mr. P....**He then tapped his head against the wall in the blue room (not hard at all). Staff did not hold [Student] at this time because of a prior conversation with mom and an agreement that staff would hold [Student] if the head banging was hard.**" (Emphasis added.)

Supreme Court U.S.
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(3)

No. 03-345

In the Supreme Court of the United States

CHRISTOPHER JAMES NYGREN
AND SHARON K. NYGREN,

Petitioners,

v.

MINNEAPOLIS PUBLIC SCHOOLS;
SPECIAL SCHOOL DISTRICT NO. 1; ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE ARC MINNESOTA AND ARC HENNEPIN-CARVER IN SUPPORT OF PETITION

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In the Matter of Proposed Rules 3525.0200-3525.4400 Governing Special Education and 3500.1000, a Rule Governing Experimental Programs, Report of the Administrative Law Judge, **at 30, ¶ 95 (69-1300-9101-1) (February 3, 1995)** **5, 6**

INTEREST OF THE AMICI CURIAE[1]

Arc Minnesota is a private, non-profit corporation dedicated to ensuring full participation in their communities of persons with developmental disabilities. Arc Minnesota has 6,000 members in 27 local and regional chapters throughout the state. Arc Hennepin-Carver is the largest of those chapters. The predecessor organizations of these two organizations advocated in the 1950s for legislation requiring local school districts to educate children with disabilities. As a result, Minnesota's special education statute was enacted years before the Congress passed the Education of the Handicapped Act in 1976.

Both Arc Minnesota and Arc Hennepin-Carver have also advocated for legislation and rules governing behavioral interventions with children and adults with mental retardation and related disabilities. Both organizations advocated for legislation requiring rules governing use of aversive and deprivation procedures in the public schools, which must emphasize positive

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[1] By letter dated August 26, 2003, counsel for the respondent Minneapolis School Board consented to submission of Amicus Curiae briefs in support of CJN's Petition for Writ of Certiorari.

No part of this brief was authored by counsel for a party. No person or entity other than the Amici, their members, or counsel have made a monetary contribution to the preparation or submission of this brief.

behavioral interventions and teaching needed skills, not simply punishment of inappropriate behavior. This law ultimately passed in 1988 (1988 Minn. Laws, ch. 544) and is now codified at Minn. Stat. §§ 121A.66 and 121A.67. Both organizations were actively involved in the rule promulgation process for, and subsequent amendments to, these rules from 1988 up through 2002.

The interests of Arc Minnesota and Arc Hennepin-Carver are that the federal courts will enforce for children with disabilities and their families more demanding state law standards in accordance with the definition of "free appropriate public education" in the Individuals with Disabilities Education Act.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA) states that a free appropriate public education under that Act must be consistent with state educational standards. Minnesota laws and rules mandate the use of positive procedures to address behavior issues of students with disabilities. Those laws also give parents the unqualified right to consent, or not, to a behavior intervention plan. The Court of Appeals did not properly apply these state law standards governing behavior intervention plans. This Court should grant certiorari to ensure proper deference to state law standards in determining whether a child with a disability has been provided a free appropriate public education.

ARGUMENT

The Congress in the IDEA and this Court in *Rowley* state that one component of the "free appropriate public education" promised by the IDEA is that it "meet the standards of the State educational agency." 20 U.S.C. § 1401(8); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley,* 458 U.S. 176, 188-189, 203 (1982). Amici sought and obtained state laws and rules governing behavior intervention with students that are more demanding than the federal standard. As the court below recognized, state standards that exceed minimum federal standards are enforceable through the IDEA. *CJN v. Minneapolis Pub. Sch.,* 323 F.3d 630, 639 (8th Cir. 2003); *see also Erickson v. Albuquerque Pub. Sch.,* 199 F.3d 1116 (10th Cir. 1999); *Blackmon v. Springfield K-XII Sch. Dist.,* 198 F.3d 648 (8th Cir. 1999).

Two fundamental components of Minnesota's more demanding state educational standards were mentioned, but not enforced, by the court below. The IDEA mandates that the team devising an IEP for a child whose behavior interferes with his education or the education of others must "consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(I). In contrast, the rule adopted to comply with the legislative charge to "promote the use of positive approaches" (Minn. Stat. § 121A.67) mandates that "behavioral intervention programs focus on skills acquisition rather than merely

behavior reduction or elimination . . . ." Minn. R. 3525.0850.

This standard is meaningless unless enforced. The court below relied on "an implicit decision of sufficiency" by the administrative hearing review officer to reject the conclusion of the hearing officer that the school district failed to comply with the state standard. 323 F.3d at 639-40, 648-49. The court explained this conclusion by quoting this Court's admonition in *Rowley* that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 323 F.3d at 640 (quoting *Rowley*, 458 U.S. at 207).

But Minnesota, at the urging of Amici, adopted the educational policy which CJN's mother sought to enforce. This Court should grant review of the Eighth Circuit decision to underscore that states are free to adopt educational policies more demanding than those imposed by Congress and that federal courts must heed and enforce those state educational policies.

Minnesota's rules also give a parent the right to refuse to consent to a behavior intervention plan and to withdraw consent, if given, at any time. Minn. R. 3525.2900, Subp. 5, E. Judge Bye, in dissent in the court below, recognized that this parent had done exactly what was her right – to refuse to accept a behavior intervention program that did not comply with state standards. 323 F.3d at 649 (8th Cir. 2003).

Amici urged such a requirement when the state rule was first adopted. The fundamental importance of that right was underscored in 1994 when the Minnesota State Board of Education proposed to repeal it as part of changes in the rule to incorporate the behavior intervention plan into the IEP itself. The Administrative Law Judge reviewing this proposal pursuant to Minn. Stat. § 14.15 demurred. He stated in part:

> The Board is removing a very significant right from parents. The SONAR [Statement of Need and Reasonableness] does not explain how inclusion of the behavior intervention plan in the IEP changes the parents' interest in controlling the use of behavioral procedures. The Board has not presented a sufficient justification to eliminate this important protection. The Board's proposal to delete this protection, being unjustified, is therefore unreasonable. To cure this defect, the language expressing the parent's right to withdraw consent to behavioral interventions apart from the discipline policy of the school must be retained.

State of Minnesota, Office of Administrative Hearings, *In the Matter of Proposed Rules 3525.0200-3525.4400 Governing Special Education and 3500.1000, a Rule Governing Experimental Programs, Report of the*

Administrative Law Judge, at 30, ¶ 95 (69-1300-9101-1) (February 3, 1995).

CJN's mother appropriately asked the court below to enforce Minnesota's educational standards. Rather than do so, that court adopted a minimal standard for FAPE, inconsistent with the statutory requirement that the child's program must meet Minnesota's higher standards. The court's conclusion that "at the very least, . . . his behavioral problems are being sufficiently controlled for him to receive some educational benefit," 323 F.3d at 642-43, is fundamentally at odds with and fails to give appropriate deference to the standards of the state educational agency.

CONCLUSION

This Court should grant the petition for certiorari to clarify what the Congress and this Court have stated – that a free appropriate public education must conform to the standards of the state educational agency.

Dated this 17th day of September, 2003.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

CHRISTOPHER J. NYGREN AND SHARON K. NYGREN,

PETITIONERS,

v.

MINNEAPOLIS PUBLIC SCHOOLS,
SPECIAL SCHOOL DISTRICT NO. 1, ET AL.

RESPONDENTS.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* CHILDREN'S LAW CENTER OF MINNESOTA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF THE ARGUMENT

Amicus Curiae Children's Law Center of Minnesota ("CLC") is a nonprofit organization whose mission is to promote the rights and interests of children, especially children of color and children with disabilities, in the judicial, child welfare, health care, and education systems.[1] As set forth in the accompanying letters, counsel for both parties have consented in writing to submission of this amicus brief.

CLC carries out its mission in two main ways: (1) by providing direct representation for children in the foster care system; and (2) by advocating and participating in state and national efforts to reform and improve the child protection and juvenile justice systems. CLC also recruits, trains, and provides consultation and support to volunteer lawyers who represent children.

Nationally, CLC is a member of the Working Group of the American Bar Association Section of Litigation Children Rights Litigation Committee that provides technical assistance in the development of children's legal programs around the country and encourages attorneys to do pro bono work for children. In addition, CLC is one of eight partners in the newly formed National Children's Law Center Network, focusing on education as a common national policy initiative, namely that all children have a right to be in school, in the right school, and to finish school. The right school means, among other things, a school that meets the special education needs of children like Petitioner, a brain injured child with impaired ability to control his behavior.

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[1] This brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

Children have rights and legal protections, but they are not self-supporting. They need someone, first, to help them understand how their lives can be better and, second, to speak effectively on their behalf and promote their important interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment.

Children in foster care often have special education needs, many with diagnoses of emotional and behavioral disabilities. In its representation projects, CLC obtains school records and works to ensure that individualized education programs are updated for children with special education needs.

CLC supports the Petition for Writ of Certiorari filed by the child Christopher Nygren and his mother Sharon Nygren. CLC submits this brief and urges reversal for two main reasons. (1) The Eighth Circuit's opinion focused solely on academic progress as measured by standardized tests to determine that Christopher had been given a free appropriate public education, ignoring that his individualized education program in third grade actually exacerbated his disability, by causing his emotional outbursts and behavioral disorders to escalate. This is a misinterpretation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., and conflicts with decisions of this Court and of other circuit courts of appeal. (2) Christopher's individualized education program was contrary to Minnesota law, which strictly regulates the type of punitive, negative measures used to respond to Christopher's emotional outbursts. The Eighth Circuit's opinion thus fails to enforce the IDEA's requirement that a free appropriate public education conform to applicable state education standards. 20 U.S.C. § 1401(8)(B).

CLC urges this Court to grant review in order to consider the significant issues raised by the Eighth Circuit's decision, and the possible adverse effects on all of Minnesota's children with emotional and behavioral disabilities. To confine review of a school's individualized education plan for a disabled child solely to whether that child has made some academic progress, as the Eighth Circuit has done in this case, will deny all disabled children in Minnesota the benefit of the broader statutory definition of a free appropriate public education, as interpreted by this Court and other circuit courts. In addition, by refusing to enforce the governing state educational standards as required by the IDEA, the Eighth Circuit's decision may increase the unauthorized use of aversion and deprivation procedures in Minnesota schools.

ARGUMENT

This case raises important questions concerning the substantive educational benefits and procedural safeguards extended to all disabled children by the IDEA. The IDEA was enacted to ensure that, for all states accepting federal assistance under the Act, "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412 (a)(1)(A); *see also* 20 U.S.C. § 1400 (d)(1)(A) (purpose of IDEA is to ensure all disabled children "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living").

The IDEA expressly covers children like Christopher with emotional and behavioral disabilities. "'Child with a

disability' means a child (i) with . . . serious emotional disturbance, ...; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A).

A "free appropriate public education" is defined as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) *meet the standards of the State educational agency*; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) *are provided in conformity with the individualized education program* required under section 1414(d) of this title." 20 U.S.C. § 1401(8) (emphasis added).

Minnesota accepts IDEA funds, and therefore, the children of Minnesota, including Christopher, are entitled to the free appropriate public education guaranteed by the IDEA.

The Eighth Circuit's decision poses at least two significant risks to children in future proceedings under the IDEA. First, the opinion may be cited as authority to immunize a school district from review of the appropriateness of an individualized education program, as long as the school can show the child has made some amount of academic progress, even where (as here) the individualized education program's approach actually causes the child's disability to worsen. Second, the Respondent District's punitive approach to disciplining Christopher, using increasing levels of isolation, time-outs, locked seclusion, and ultimately forcible removal from the school, in handcuffs, by the police, will be viewed as permissible, despite its violation of state educational standards.

I. THE EIGHTH CIRCUIT IMPROPERLY HELD THAT A CHILD WHO HAS MADE SOME ACADEMIC PROGRESS, REGARDLESS OF HOW INAPPROPRIATELY THAT CHILD'S DISABILITY WAS TREATED, HAS RECEIVED A FREE APPROPRIATE PUBLIC EDUCATION.

A. The Eighth Circuit holds that evidence of academic progress suffices to meet every element of a free appropriate public education.

Judge Bye's dissent concisely identifies the most troubling aspect of the Eighth Circuit majority's opinion. It "essentially holds the District can satisfy its duty to provide a [free appropriate public education] so long as a student with a *behavioral* disability makes *academic* progress." *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 645 (8th Cir. 2003) (Bye, J. dissenting) (emphasis in original). By steadily repeating its mantra of "academic progress," the Eighth Circuit's majority opinion finds irrelevant the evidence that the District's approach to Christopher's third-grade education actually caused him to regress behaviorally, replacing his first and second grade behavioral progress with escalating outbursts that culminated in suicidal behavior.

The Eighth Circuit claims that it did not confine its analysis to Christopher's standardized test scores, yet in every instance, its reasoning circles back to reliance on academic progress as the sole basis for concluding that Christopher's abysmal third-grade experience in the Minneapolis public schools met the IDEA's requirement of a free appropriate public education.

For example, the majority views the district court's acknowledgement of Christopher's academic progress as

proof that his individualized education program was appropriately managing his behavioral problems. 323 F.2d at 638. The majority then notes that Christopher has "severe" behavioral difficulties, but again emphasizes that he "has always progressed academically at an average rate," concluding that his academic progress "demonstrates that his [individualized education programs] were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well." *Id.* The majority repeats its equation of academic progress with a free appropriate education later on in its opinion, stating "the fact that [Christopher] is learning is significant evidence that his behavioral problems have, at least in part, been attended to." *Id.* at 642.

The majority opinion's single-minded focus on academic progress leads it to refuse to look behind Christopher's test scores to the propriety of the Respondent District's approach to Christopher's disability. While expressing "regret" at the way Christopher was treated, the Eighth Circuit holds that the type of treatment a disabled child receives is "irrelevant," so long as the child continues to show some academic progress. 323 F.3d at 639. "Thus, even assuming *arguendo* that more positive behavior interventions could have been employed, that fact is largely irrelevant." *Id.* In effect, the Eighth Circuit majority's opinion transforms the individualized education program into a black box, which the court will refuse to open, absent definitive proof that a child has stopped making academic progress.

B. The IDEA requires appropriate treatment of a child's disability as well as academic progress.

Every child entitled to benefits under the IDEA is entitled to receive an actual benefit under his or her

individualized education program that does not negatively impact his or her disability. That Christopher was learning within the average range on a standardized test is not determinative that his individualized education program was appropriate, particularly where the School District demonstrably failed to provide an adequate plan to address his undisputed emotional and behavioral disability. *See Board of Education of Hendrick Hudson Central School District, Westchester County vs. Rowley*, 458 U.S. 176, 201 n.23 (1982) (citing legislative history that handicapped children be enabled to achieve a reasonable degree of self-sufficiency).

This court's seminal decision in *Rowley* established that the predecessor statute to the IDEA requires more than just access to a public education for handicapped children. This Court carefully examined the intent of Congress and concluded that the statute was designed to provide a "basic floor of opportunity" for all disabled children, consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201. In support of this conclusion, this Court cited to the frequent references in the legislative history to Congress' goal of enabling handicapped children to "achieve a reasonable degree of self-sufficiency." *Id.* at n.23. Although the Court declined to interpret "self-sufficiency" as the substantive standard which Congress imposed upon the states through this legislation, the Court interpreted the self-sufficiency references as evidence that Congress intended the specialized, individually-tailored services provided under the legislation to be "educationally beneficial, whatever the nature or severity of [the child's] handicap." *Id.*

The *Rowley* opinion also emphasized that the statutory definition of a free appropriate public education cannot be disregarded. 458 U.S. at 188-89. That definition is not confined to a single parameter of measuring academic progress, but rather has four separate elements, all of which must be satisfied in order for a school to comply with the IDEA. 20 U.S.C § 1401(8)(A) – (D).

The Eighth Circuit's opinion substantially narrows the IDEA, by holding that evidence that a disabled child has made some academic progress is sufficient to prove compliance with all elements of the statutorily required free appropriate public education, regardless of whether the "specialized instruction and related services" provided to the disabled child are completely inadequate to address the child's admitted disability, and in fact have the effect of substantially worsening that disability.

C. Failure to look behind academic progress places disabled children at risk of inappropriate treatment of their disabilities.

The Eighth Circuit's willingness to ignore the way in which Christopher's behavioral problems deteriorated significantly in his third grade year, when he was faced with a teacher who refused to acknowledge his disability or to provide the individualized support services he needed to control his behavior, emphasizes the danger of the Eighth Circuit's interpretation of the IDEA. The school district's approach to Christopher's emotional disability in the third grade created a vicious cycle of escalating outbursts and increasing use of punitive measures (restraint, time-outs, and calling the police), ultimately culminating in this third-grade child attempting suicide. Under the Eighth Circuit's holding, the fact that an individualized education program causes a

child to become self-destructive is irrelevant, so long as that child continues to make academic progress.

As the Eighth Circuit itself acknowledged, the record here indicated that this student's behavioral problems, if unattended, might significantly curtail his ability to learn. 323 F.3d at 638. Undoubtedly, if this child's mother had left him in the situation to which he was subjected in his third grade year in the Minneapolis Public School system, his academic progress would have deteriorated. The fact that Christopher's mother refused to allow that to happen to her child, and promptly removed him from the Minneapolis public school system when she became convinced that the Respondent District was not going to take positive measures to address his escalating emotional disability, meant that she removed him from the adverse learning environment before his academic progress had significantly deteriorated. Surely the law does not require parents to leave a disabled child in an inappropriate educational environment long enough for the child's standardized test scores to suffer in order to establish that the child has not received a free appropriate public education.

D. The Eighth Circuit's holding conflicts with other circuits who recognize the broader requirements of the IDEA's definition of a free appropriate public education.

The Eighth Circuit's holding that all elements of the IDEA's definition of a free appropriate public education can be met solely by evidence that a student has made academic progress conflicts with the decisions of other circuits, who have taken a broader view of the IDEA's requirements. For example, the First Circuit, in *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied,*

499 U.S. 912 (1991), held that "purely academic progress . . . is not the only indicia of educational benefit implicated either by the Act or by state law." Likewise, the Fifth Circuit in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998), identified four factors that must be analyzed to determine whether an individualized education program complies with the IDEA, including that both "positive academic and non-academic benefits are demonstrated." Similarly, the Ninth Circuit in *Seattle School District, No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996), noted that standardized test results are "not the sine qua non of 'educational benefit,'" for purposes of the IDEA. Instead, citing the legislative history, the Ninth Circuit concluded that educational benefit must be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs. *Id. See also Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 516 (6th Cir. 1984) (an individualized education program that focused solely on educational issues and failed to account for a disabled child's emotional disturbance and inability to cooperate with authority did not satisfy the IDEA).

In *Rowley*, this Court cautioned against setting up academic progress as the sole measure for compliance with the IDEA's predecessor statute. "[W]e do not hold today that every handicapped child that is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.'" 458 U.S. at 203 n.25. The Eighth Circuit, in contrast to the First, Fifth, and Ninth Circuits, has now reached a holding that does equate academic progress alone with a free appropriate public education. The conflict between the Eighth Circuit's restrictive view of the IDEA's definition of a free appropriate public education and the broader views of other circuits raises

an important question, explicitly left unresolved in *Rowley*, that this Court should resolve.

II. THE CHILD'S INDIVIDUALIZED EDUCATION PLAN FAILED TO COMPLY WITH THE IDEA'S REQUIREMENT THAT A FREE APPROPRIATE PUBLIC EDUCATION MUST MEET STATE EDUCATIONAL STANDARDS.

As this Court recognized in *Rowley*, the statutory definition of a "free appropriate public education" has four elements, the second of which requires the school's special education and related services for each child to "meet the standards of the state educational agency." 20 U.S.C. § 1401(8)(B). The Eighth Circuit acknowledged that state educational standards are enforceable through the IDEA, but proceeded to refuse to enforce them, dismissing all of the demonstrated violations of state standards as "minor 'procedural and technical deficiencies'" that could not support a claim under the IDEA. 323 F.3d at 639.

Minnesota state law strictly regulates the kind of punitive and aversive measures that the Respondent District employed to address Christopher's behavioral disability in his third grade year. Minn. Stat. § 121A.67(1) requires the state to adopt rules that must "promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures." In addition, any planned use of aversive or deprivation procedures must "be a part of an individual education plan." Minn. Stat. § 121A.67(2). Minnesota's rules, in turn, "encourage the use of positive approaches to behavioral interventions" and require all behavioral interventions to "focus on skills acquisition rather than merely behavior reduction or elimination." Minn. Rules § 3525.0850.

Christopher's individualized education program did not contain any planned use of aversive or deprivation procedures, and his previous experience in first and second grade had shown the time-out approach to be unsuccessful in addressing his disability. 323 F.3d at 645. Nevertheless, time-outs, restraints, and even police intervention, were regularly used on Christopher from the beginning of his third grade year. The Eighth Circuit dismissed that as a technicality, focusing on the fact that no formal "behavioral intervention plan" was adopted for his third grade year because his mother disagreed with the proposal. 323 F.3d at 640.

What the Eighth Circuit ignored is that Minnesota law specifically permits parents to object to any behavioral intervention plan that would require or countenance such negative actions toward the child. Minn. Rules § 3525.2900, subp. 5(E) (parent has the right to withdraw consent for a behavior intervention plan at any time). To the extent that such measures continued to be employed regularly without parental consent established beyond dispute that Minnesota's state standards were not followed in Christopher's case. By definition, therefore, Christopher was not afforded a free appropriate public education as defined in 20 U.S.C. § 1401(8)(B).

The danger of failing to require Minnesota's schools to adhere to state educational standards is particularly acute for the disadvantaged children CLC serves. Minnesota has recently begun to keep statistics on the number of reports of abuse for children with disabilities subjected to aversive and deprivation procedures as a way to control their behavior in Minnesota's schools. Since 1999, when the Maltreatment of Minors Program at the Minnesota Department of Children Families and Learning (recently renamed as the Department of Education) started to keep statistics, forty percent of the

596 reports of maltreatment made to the Department alleged that disabled students are subject to child abuse by the improper use of aversion and deprivation techniques. Indeed, while Minn. Stat. § 121A.67 permits the "planned application of aversive and deprivation procedures [that are] part of an individual education plan," such procedures that are not authorized are reportable as physical abuse under Minn. Stat. § 626.556.

The Eighth Circuit's decision in this case puts Minnesota in the anomalous position of permitting schools to claim that they have provided a free appropriate public education through the use of unauthorized and inappropriate aversive and deprivation techniques on students with disabilities – even where those same behavioral techniques would otherwise be criminal under Minnesota state law.

Even though the Eighth Circuit pays lip service to the statutory definition and case law holding that a failure to meet state educational standards constitutes a denial of the free appropriate public education required by the IDEA, the substantive effect of its decision to ignore state standards as minor technicalities creates a conflict with other circuits that have enforced state standards as substantive requirements through the IDEA. *See, e.g., Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986); *David D. v. Dartmouth School Committee*, 775 F.2d 411, 420 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). The Eighth Circuit's erroneous interpretation of the IDEA to permit school districts to ignore their own state educational standards provides another compelling reason to grant the Petition.

CONCLUSION

For the above-stated reasons, *Amicus Curiae* Children's Law Center of Minnesota respectfully submits that compelling reasons support granting the petition of Christopher and Sharon Nygren for a writ of certiorari in this matter.

October 6, 2003

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